

UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
JAMES C. McWHORTER,  
Defendant.

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)  
)  
)  
) No. 3:07-CR-00159-1  
) C.O.A. No. 10-5939  
)  
)  
) **VOLUME 8**  
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)

APPEARANCES:

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Case 3:07-cr-00159 Document 525 Filed 09/28/10 Page 1 of 162 PageID #: 3832

**I N D E X****WITNESS:**

MATTHEW STEVENSON

Direct Examination by Mr. Howard

Page 561

Cross Examination by Mr. Frensley

Page 577

SENTENCING

Page 687

1           The above-styled cause came on to be heard  
2           on June 28, 2010, at 10:00 a.m., before the Honorable  
3           Robert L. Echols, Senior Judge, when the following  
4           proceedings were had, to-wit:

5           THE COURT: Be seated, please.

6           I apologize to the lawyers and others. I had a doctor's  
7           appointment this morning and I had to wait, and it was longer  
8           than I thought. So we're a little late getting started.

9           The first case today is United States of America vs.  
10          James C. McWhorter, Criminal Case 3:07-00159.

11          The case is scheduled today for the sentencing of  
12          Mr. McWhorter. Mr. McWhorter was one of nine defendants  
13          charged in this case, which involved a conspiracy to commit  
14          crimes against the United States. More specifically, they  
15          were related to identity theft and the production of false  
16          identification documents and so forth.

17          Mr. McWhorter is represented today by Mr. Jeffrey  
18          Frensley, who represented him at his trial. Mr. Ty Howard is  
19          here representing the United States Attorney's office.

20          This case went to trial. And the jury found on November  
21          the 20th, 2009 that Mr. McWhorter was guilty of all five  
22          counts listed in the Second Superceding Indictment issued  
23          against him in May of 2009.

24          After the trial, the probation department prepared its  
25          normal sentencing memorandum -- pretrial report, rather, and

1 furnished it to the lawyers. There are some objections to  
2 that report filed by the defendant.

3 Mr. McWhorter has been in jail since, I think, November  
4 of 2006. So that report has been revised -- it was revised  
5 on June the 10th.

6 Are there any objections to the revised report? I'm not  
7 aware of any that haven't been filed.

8 MR. FRENSLEY: There are, and they have been filed,  
9 Your Honor.

10 THE COURT: Okay. Okay, we'll take up those  
11 objections.

12 Mr. Frensley has set forth those objections in a report  
13 filed with the Court. Of course, the Government has a copy  
14 of it. He has also filed a *Sentencing Memorandum*.

15 The Government also has filed a *Sentencing Memorandum*  
16 and takes issue with the objections filed by Mr. Frensley on  
17 behalf of Mr. McWhorter.

18 So we'll begin there, unless the lawyers think they have  
19 something else that should be addressed before we get to the  
20 objections. If not, we'll start with those objections.

21 Okay, Mr. Frensley. Yours are set forth clearly in your  
22 paper, and they begin with the amount of loss.

23 The presentence report itemized the loss, as contained  
24 in Paragraphs 24 and 25 of the *Presentence Investigative*  
25 *Report*.

1           The greatest loss, of course, was sustained by Wal-Mart.  
2           And in the presentence report there are two figures listed.  
3           One is the actual loss by the victims of the fraudulent  
4           checks, and the other category was intended loss.

5           There were apparently hundreds of checks that were  
6           produced. And many of those were passed, but many were not  
7           passed. And so those intended losses are also stated in  
8           Paragraphs 24 and 25.

9           The report indicates that the actual loss was  
10          \$128,383.55. I believe that's been modified by the  
11          Government. Then there's the other element of the loss,  
12          which is the intended loss. The presentence report indicates  
13          that that's \$118,064.89. Those being checks that were  
14          attempted to be cashed, but they were not cashed. They were  
15          unsuccessful in doing so. So the presentence report comes up  
16          with a total loss of \$246,448.44.

17          So, Mr. Frensley, I'll be happy to hear from you more  
18          specifically on the amount of loss.

19          That's followed, of course, by another objection.  
20          Basically, that Mr. McWhorter should be given some credit for  
21          his acceptance of responsibility in Counts 1 through 4.

22          And then there's an objection to the enhancement in the  
23          presentence report for use of the authentication features in  
24          the driver's licenses.

25          These were false checks, but also fraudulent driver's

1 licenses that were to be matched with the checks in order to  
2 facilitate the passage of these checks, most of which were  
3 payroll checks that were also fraudulently created as part of  
4 the scheme.

5 And, lastly, I believe there is an objection to the  
6 enhancement, as suggested in the presentence report, that  
7 Mr. McWhorter was a leader or manager of this conspiracy.  
8 And he received in the calculations by the presentence report  
9 writer four points, four levels.

10 Okay, Mr. Frensley.

11 MR. FRENSLEY: Thank you, Your Honor.

12 May it please the Court. As Your Honor is well aware,  
13 when determining the guidelines for offenses that are  
14 financial in nature, loss is the driving factor. The  
15 Government bears the burden of proof of establishing the  
16 amount of loss and must do so by a preponderance of the  
17 evidence.

18 The Sixth Circuit has held in *United States vs. Comer*  
19 that the loss can't be speculation alone. There has to be  
20 some articulable basis for proving that loss.

21 In this case on the issue of loss, Your Honor will  
22 recall at trial the Government called Kathy Sawn, who was an  
23 investigator for Wal-Mart, who testified about the loss to  
24 Wal-Mart. And her testimony under oath at trial put that  
25 loss at approximately \$39,000.

1           Now, I understand that that wasn't -- it wasn't clear  
2           whether that was to reach intended loss, actual loss, or  
3           what; but that was the testimony of the Wal-Mart fraud  
4           investigator with respect to the amount of loss at that time.

5           There was, as Your Honor noted, an initial presentence  
6           report in this matter, wherein the Government provided  
7           certain information upon which the probation officer could  
8           determine the amount of loss. And in that initial report,  
9           Your Honor, the amount of loss was put at \$281,256.95.

10          There was the second and revised report in this case  
11          where, as Your Honor has just indicated, the loss is at  
12          \$214,208.29. And then now, the Government has filed in its  
13          position paper a further adjustment to that, reflecting a  
14          loss of \$203,884.83, of actual loss.

15          The loss according to the guidelines is separated into  
16          two categories, as Your Honor indicated. First is actual  
17          loss. That is for the amounts of loss attributed to checks  
18          that were actually cashed. The second is to reach intended  
19          loss. And that is those attempts to pass a check that did  
20          not, for whatever reason, result in the check actually being  
21          passed.

22          In this case, with respect to the losses in question,  
23          the real issue, Your Honor, boils down to the loss  
24          attributable to Wal-Mart in this case. Because those are the  
25          ones which, first of all, account for the most significant

1 amounts of loss in this case; and, secondly, are the ones  
2 upon which the Government has actually provided some type of  
3 documentation, albeit changing over the course of the  
4 proceedings.

5 With respect to the actual loss, Your Honor, that actual  
6 loss was indicated and reflected, with respect to Wal-Mart,  
7 downward to amount to now \$85,819.94 is the loss that the  
8 Government suggests Wal-Mart has suffered.

9 And the basis for that loss, Your Honor, is what I  
10 understand the Government has filed as an attachment to its  
11 position and would be reflected in Exhibit B to that  
12 attachment.

13 First of all, Your Honor, we would submit that this  
14 doesn't meet the test with respect to the burden that the  
15 Government bears. While hearsay is admissible in sentencing  
16 proceedings and while the burden of proof is not as great as  
17 it would be at trial, I respectfully submit that merely  
18 having Wal-Mart or someone put together a spreadsheet that  
19 purports to represent certain checks does not meet the burden  
20 that the Government must carry in this matter.

21 To that extent, the only competent evidence with respect  
22 to actual loss is the trial testimony of Ms. Sawn, which  
23 would be \$39,000.

24 However, Your Honor, even setting forth that, it's my  
25 understanding that the Government's pleading at Exhibit B



1       that deals with actual loss contains certain highlighted  
2       areas that the Government purports to deduct from the total.

3             Again, Wal-Mart apparently has given them this  
4       information. They've gone through and recognized that some  
5       of these things --

6             For example, on Page 1 of Exhibit B, the first ten  
7       entries, Your Honor, are all entries that purport to be loss  
8       attributable to Mr. McWhorter that occurred prior to the  
9       events giving rise to this case.

10            Your Honor will recall from the trial testimony that  
11       Mr. McWhorter had been serving a prison sentence in the  
12       Tennessee Department of Correction. And, therefore, the  
13       Government has retracted these items because they all  
14       occurred when Mr. McWhorter was actually serving a sentence  
15       and prior to the initiation of this conspiracy at issue.

16            The documents likewise contain additional entries which  
17       the Government has, to their credit, redacted or retracted.  
18       At Entries 30 and 31 are checks that were purportedly cashed  
19       in Green Bay, Wisconsin.

20            Again, I think the trial testimony in this case was  
21       pretty clear as to the areas of Nashville, Davidson County,  
22       and then eastward toward the plateau, as to where these  
23       events occurred.

24            Likewise, Your Honor, this document includes certain  
25       items that the Government has retracted that occurred after

1 Mr. McWhorter was arrested in this case and, therefore,  
2 should not even have properly been a part of these  
3 calculations. Those begin at Entry No. 144, continuing  
4 forward.

5 Now, this is significant for several reasons, Your  
6 Honor. First of all, because the Government purports to  
7 derive its number from information provided by Wal-Mart.  
8 This information provided by Wal-Mart, they even acknowledge  
9 now in their pleadings, is not accurate or complete.

10 So I think it legitimately calls into question the other  
11 entries that are contained therein and suggests that in the  
12 absence of additional greater proof, that those entries, just  
13 because Wal-Mart submitted them, don't meet the test with  
14 respect to the Government's burden of proof.

15 There's another issue with respect to this spreadsheet  
16 that's been provided at Exhibit B, and that is --

17 And I apologize, Your Honor, that this is so confusing,  
18 but it occurred to me to check the math. And I consulted  
19 with Mr. Howard about this just before Your Honor came on the  
20 bench, after having gone through the math on these  
21 highlighted areas. It appears that the math is wrong with  
22 respect to the highlighted areas.

23 On the last page of Exhibit B where it has the totals,  
24 it has a total for all of the check amounts as being  
25 \$96,143.40. And then it has "less highlighted rows", which

1       purport to be the total of the highlighted rows. And that  
2       number is \$10,332.46.

3               However, Your Honor, when I went through the highlighted  
4       rows on my copy of that document, that total came to  
5       \$12,047.02. And I did this math about five times.

6               I tell people that I became a lawyer because I didn't  
7       really do very well at math, and that's why I checked it so  
8       many times. But I repeatedly got the same answer, which was  
9       instead of the \$10,323 it was \$12,047.02. Which would reduce  
10      the total amount of actual loss even further.

11              Now, the Government -- in June, you'll recall that there  
12      was a revision to the presentence report, where the  
13      Government provided more refined evidence and documentation  
14      with respect to the presentence report. That was arranged in  
15      a slightly different format than what's at Exhibit B, but I  
16      suspect was the exact same information.

17              In our position paper, having reviewed those documents,  
18      based upon items that were either before or after the  
19      conspiracy --

20              And it's significant in this case because before and  
21      after the conspiracy, you'll recall the testimony was that  
22      Mr. McWhorter was in prison. So that's why it's not just a  
23      matter of was the conspiracy date accurate. Mr. McWhorter  
24      was unavailable to be involved in any such conspiracy.

25              But the number of -- the amount of overrepresentation

1       that we assert is included based on those before and after  
2       dates, duplicate dates, and other entries not attributable to  
3       Mr. McWhorter is \$29,301.04. And that's the amount that we  
4       submitted in our position paper is overrepresented to  
5       Wal-Mart in the actual loss.

6               So assuming the number that Mr. McWhorter submits, the  
7       amount of actual loss to Wal-Mart would be \$66,842.36.

8               THE COURT: And did you get that figure by  
9       subtracting the \$29,301 from the \$85,819?

10              MR. FRENSLEY: It was actually subtracted from the  
11       \$96,143.40, which was the original number.

12              THE COURT: All right.

13              MR. FRENSLEY: Well, it was the second original  
14       number, Your Honor.

15              THE COURT: So you're saying rather than the setoff  
16       for the highlighted rows of \$10,323.46, it should have been  
17       \$29,301.04.

18              MR. FRENSLEY: That's our position, Your Honor.

19              THE COURT: Right.

20              MR. FRENSLEY: However, we have a second position,  
21       which is even if Your Honor only sets off the Government's  
22       highlighted rows, that amount is inaccurate and it should  
23       be --

24              If Your Honor just agrees with the Government, accepts  
25       the Government's proof, those highlighted rows on my sheet

1           come to a total of \$12,047.02.

2           Now, I've told Your Honor what our position is with  
3           respect to the amount of actual loss to Wal-Mart. And I've  
4           spoken a little bit to the Government's position on actual  
5           loss.

6           But looking at the spreadsheet, Your Honor, on actual  
7           loss that the Government has submitted, I would submit that  
8           there are additional entries that were not highlighted on my  
9           sheet that also should not be attributable to Mr. McWhorter.  
10          And if Your Honor will allow, I'll just go through those.

11          On my sheet, Your Honor, the first three entries, 1, 2,  
12          and 3 --

13                 THE COURT: What are you looking at now?

14                 MR. FRENSLEY: I'm looking at Exhibit B in the  
15                 Government's pleading.

16                 THE COURT: That starts with No. 1.

17                 MR. FRENSLEY: Yes, Your Honor. At the top of the  
18                 page it says *Wal-Mart - Actual Loss*.

19                 THE COURT: Yes. Okay. And the first one is  
20                 Edwards.

21                 MR. FRENSLEY: That's right, Your Honor.

22                 On my sheet, Your Honor, Entries 1, 2, and 3 are not  
23                 highlighted. And if you go across the top row, again those  
24                 three checks were cashed January '05 and February of '05,  
25                 which again is the time that Mr. McWhorter was not in

1 custody -- or I'm sorry, was in state custody, prior to this  
2 conspiracy beginning.

3 So I would submit that those three entries, Your Honor,  
4 should also be added to the Government's list. And those  
5 total \$400.

6 THE COURT: Now, the first one was cashed  
7 January 12th, '05. The second one, January the 18th, '05.  
8 The third one, according to mine, was February the 16th, '05.

9 MR. FRENSLEY: That's right, Your Honor.

10 THE COURT: Okay.

11 MR. FRENSLEY: That's correct.

12 And, again, the conspiracy is alleged to have begun, in  
13 the indictment, on or about March the 1st. What's  
14 significant is prior to that conspiracy beginning,  
15 Mr. McWhorter was in prison.

16 So he was in prison during the time those three checks  
17 were cashed and he couldn't have done it. He couldn't even  
18 have been involved in the conspiracy because the conspiracy  
19 didn't begin, irrespective of the date, until after he was  
20 released from custody.

21 So that would be an additional \$400 to the Government's  
22 amount.

23 And then, Your Honor, on Page 2, at Item No. 25.

24 THE COURT: Okay.

25 MR. FRENSLEY: If Your Honor will look at Items 24

1       and 25, they appear to be duplicate entries for the same  
2       transaction. 24 and 25 both involved Mario Gray. The  
3       cashier address is the same. The city and state are the  
4       same. The position check number is the same. And all the  
5       way across.

6               So I would submit that one of those entries should be  
7       redacted, as well. Because they're clearly duplicate entries  
8       of the same transaction.

9               So that would be, on that page, an additional \$498.64 to  
10      be subtracted from the Government's number.

11              THE COURT: Okay.

12              MR. FRENSLEY: Then, Your Honor, at Entry No. 78.

13              THE COURT: Okay.

14              MR. FRENSLEY: On that entry, Your Honor, you'll  
15      see there's some information that's not clear there. It does  
16      state that the name on the check is the State of Tennessee;  
17      but then if you go across to the location at which that check  
18      was passed, you'll see it's Grove City, Ohio.

19              Now, again, Your Honor, I submit that there's no  
20      evidence that's been presented in any context with respect to  
21      this case that there was any activity outside of Tennessee,  
22      and certainly nothing to suggest that a check would have been  
23      cashed in Grove City, Ohio.

24              I would submit that this, for whatever reason, just  
25      appears to be an entry that was inadvertently included there.

1       So that check would amount to a reduction of \$184.60.

2       The next entry, Your Honor is at Item 125.

3               THE COURT:   Okay.

4               MR. FRENSLEY:   And this check, Your Honor --

5               MR. HOWARD:   Which one?

6               MR. FRENSLEY:   125.

7               On this check the individual is someone named Ebony  
8       Horton.   And if you go across to the end, Your Honor, where  
9       this check was passed, it appears to have been passed in  
10      Brownsville, Tennessee; which, of course, is in west  
11      Tennessee.

12              And it is inconsistent with the entire body of these  
13      checks.   There don't appear to be any other checks, for the  
14      most part, cashed west of the Tennessee River.

15              Again, the trial testimony doesn't suggest there were  
16      transactions made anywhere other than the Nashville area and  
17      east, on the plateau.

18              So I respectfully submit that this entry, Ebony Horton,  
19      is an inadvertent entry which should be deducted, as well, in  
20      the amount of \$134.71.

21              Next, Your Honor, is Entries 128 and 129.   These appear,  
22      again, to be duplicate entries of the same transaction.   If  
23      you carry each of those lines across, every line is  
24      identical.   The position check number, the dates, the  
25      cashier, the amounts, and the location.



1 THE COURT: Okay.

2 MR. FRENSLEY: So that would be, Your Honor, an  
3 additional reduction of one of those checks, \$498.32.

4 The next entry, Your Honor, is at 136. This is a check  
5 purportedly cashed by someone named Cynthia Jackson in the  
6 amount of \$84. And the location was Bartlett, Tennessee;  
7 which again, Your Honor, is the Memphis area.

8 It would be outside any evidence presented in this case  
9 with respect to the scope of the action, and likewise is  
10 inconsistent with the entire spreadsheet.

11 There really just -- there's just this couple of checks  
12 in the Memphis area. That would suggest, Your Honor, that  
13 they are inadvertently included here and not attributable to  
14 this conspiracy in any regard. That check totals \$84.

15 With that, Your Honor, the total amount of those checks,  
16 using the Government's own document that they provided as  
17 Exhibit B, that we take issue with is \$1,800.27.

18 THE COURT: Okay.

19 MR. FRENSLEY: So if Your Honor were to accept the  
20 Government's version of Exhibit B as the actual amount of  
21 loss to Wal-Mart, taking into account the error in arithmetic  
22 on the highlighted checks and this additional \$1,800, we  
23 would submit that the total amount of actual loss to Wal-Mart  
24 under the Government's own calculations should be \$82,296.11.

25 So that highlights the defendant's --

1 THE COURT: You say the actual loss?

2 MR. FRENSLEY: Actual loss. Yes, Your Honor.  
3 \$82,296.11.

4 So with that, Your Honor, with respect to the actual  
5 loss, we have our initial position with respect to what we  
6 believe the amount is; but even if Your Honor were to accept  
7 the Government's position, taking into account the arithmetic  
8 error and the additional checks that I've submitted should  
9 not have been counted as well because of duplication, outside  
10 the time, or unrelated to the conspiracy in any regard, it  
11 should result in a significantly lower number as well.

12 Unless Your Honor has any other questions about the  
13 actual loss amount, I'll move to the intended loss issue.

14 THE COURT: Okay. Go ahead.

15 MR. FRENSLEY: With respect to the intended loss,  
16 Your Honor, the Government has asserted in its position paper  
17 a position that basically every time an attempt was made,  
18 that should be counted against the number for purposes of the  
19 conspiracy.

20 We have in our position paper, Your Honor, submitted a  
21 number of entries on the spreadsheet, which is I believe  
22 Exhibit C to the Government's plea. And the basis of our  
23 argument here with respect to the overrepresentation is that  
24 it appears that a number of these checks were attempted to be  
25 passed within a very short period of time, at exactly the

1 same location. And that, Your Honor, we would submit  
2 constitutes one intended loss.

3 And it's important, I think, Your Honor, to draw a  
4 distinction, as the guidelines do, between attempted and  
5 intended, because it's significant in this case. And I'll  
6 give Your Honor an example here.

7 If Your Honor will look at Exhibit C, at Entries No. 12  
8 and 13, I submit that this is representative of the kind of  
9 issue that we're raising with respect to the intended loss to  
10 Wal-Mart.

11 These checks to Wal-Mart at Entries 12 and 13 again  
12 match up in all regards all the way across the spreadsheet.  
13 They're the same date, the same check number, the same face  
14 amount, the same name, the same store, and the same --

15 And this last entry is significant, too, Your Honor,  
16 when it talks about station number. It's my understanding  
17 and belief that what this represents is the particular  
18 cashier station where the check is attempting to be  
19 processed.

20 Now, if you look at 12 and 13, they're identical in all  
21 respects except one. And the one area where they're not  
22 identical is the time. And that's in the second substantive  
23 column, where it says *Eastern Time* at the top.

24 If you come down and look at the times on Entries 12 and  
25 13, what you have is for Entry 12 they attempted to run that

1 check through the machine at 2203 and one second. On 13,  
2 they attempted to run that check through the machine at 2203  
3 and six seconds. So there's a five second difference between  
4 these two entries, but in all other respects they're  
5 identical.

6 What I would submit, Your Honor, is the more probable  
7 explanation of what this is is that the cashier -- we've all  
8 seen it happen in our common experience. The cashier runs  
9 the check. And if for some reason it doesn't accept, they  
10 run it back through again.

11 I would submit that given the time here between these  
12 entries of just five seconds, that this doesn't constitute a  
13 second intended loss. These two entries represent one  
14 intended loss. And for whatever reason, the check was run  
15 through more than -- on more than one occasion.

16 Now, the Government's position, I think, would be a more  
17 compelling position if there was a significant time  
18 differential. Say, for example, the first check is run at  
19 2203:01 and the second check is run an hour later and at a  
20 different station.

21 But to the extent that all of these entries that we've  
22 identified as overrepresentative here are situations similar  
23 to this, where you have a very, very short window and in all  
24 other respects the information is identical, then it's our  
25 position that consistent with the language in the guideline,

1       being intended loss as opposed to attempted loss, that the  
2       amount should be reduced accordingly based on the multiple  
3       runs of the check.

4               And we've done this. Our position and what we've set  
5       out in our papers does this only for those entries that are  
6       close in time, but otherwise identical. So you're talking  
7       about within a minute or so of each other. Those are the  
8       ones that are redacted.

9               So we would submit, Your Honor, that consistent with the  
10      guideline approach with respect to intended loss, that the  
11      amount of attempted checks submitted at Exhibit C is  
12      overrepresented in the amount of \$35,401.15.

13              THE COURT: Where is that amount listed in this  
14      line? This entry.

15              MR. FRENSLEY: The amount on Entry 12? It's where  
16      it says *Face Amount*. It's the fourth column.

17              THE COURT: Okay.

18              MR. FRENSLEY: And you can see again No. 12,  
19      597.13. No. 13, 597.13.

20              THE COURT: Okay. 597? Is that what that is?

21              MR. FRENSLEY: They're identical in all regards  
22      except for that time. And the time in this particular  
23      example is five seconds apart.

24              THE COURT: Okay.

25              MR. FRENSLEY: Now, Your Honor, I know that the

1 exercise is tedious. But it's significant in this case, Your  
2 Honor.

3 It's significant in this case because, again,  
4 determining the guidelines with respect to the amount of loss  
5 has a significant effect on the guideline calculation in this  
6 case. And I would submit that --

7 You know, the guidelines talk about precision. They  
8 talk about how, you know, it needs to be a reasonable  
9 estimate. But I would submit that you have to hold that up  
10 against the well-established law in the Sixth Circuit that  
11 they can't -- it can't be based on speculation and the  
12 Government does have some burden of proof here.

13 And I would submit that the cases that talk about a  
14 reasonable estimation talk about within a range. And so with  
15 respect to these items, whether Your Honor were to accept our  
16 loss calculations or to accept the Government's loss  
17 calculations, with respect to the additional items and the  
18 arithmetic error that I indicated, it becomes significant.

19 Because either way, if Your Honor agrees with either of  
20 those arguments, what it does is it reduces the amount of  
21 loss to under \$200,000.

22 If Your Honor agrees with the calculation that the  
23 defendant set forth, that amount is \$181,746.25. And I  
24 apologize. I haven't done the math on the Government's loss.  
25 It's probably around \$190,000. There's a difference --

1           If Your Honor accepts our intended loss argument and  
2           accepts the amount that I've indicated with respect to the  
3           Government's amount, it still falls below the \$200,000  
4           threshold, which is the breaking point for the guideline  
5           calculation.

6           So with respect to the loss amount, Your Honor, again  
7           even --

8           THE COURT: Is that the only intended loss item you  
9           have quarrels with?

10          MR. FRENSLEY: I'm sorry?

11          THE COURT: You're on the intended or attempted  
12          cash cashing. That's where we are. You've pointed me to  
13          Items 12 than 13.

14          Do you have other complaints?

15          MR. FRENSLEY: Yes, Your Honor.

16          With respect to those, those are set forth in the  
17          position paper. And I can go through the numbers there.

18          At Page 3 of my position paper that I filed, Your  
19          Honor --

20          THE COURT: Right.

21          MR. FRENSLEY: -- it sets forth the entries.

22          THE COURT: At the top.

23          MR. FRENSLEY: There are a significant number of  
24          those. I can -- I'm certainly happy to, if the Court would  
25          like me to go through each one.

1           It's that same scenario. It's either an issue of  
2           duplication or, you know, transactions within a very, very  
3           short time period of each other. And the total amount for  
4           those is \$35,401.15.

5           Would Your Honor like me to take you through each of  
6           those that I've identified?

7           THE COURT: I don't think so. We would be here  
8           until the afternoon.

9           MR. FRENSLEY: I understand, Judge.

10          THE COURT: Okay. Anything else on the loss?

11          MR. FRENSLEY: That's the issue on the loss.

12          THE COURT: Okay. Let's hear from the Government.

13          MR. HOWARD: Your Honor, I think the key -- the key  
14          phrase in the guidelines or the key task for the Court is to  
15          determine a reasonable estimate. A reasonable estimate of  
16          the loss in this case.

17          And what I would like to do, with the Court's  
18          permission, is call the agent who is the primary author of  
19          the data that appears in the spreadsheets and have him give  
20          some testimony regarding how it was reached. And then I will  
21          continue with my remarks, if I may.

22          THE COURT: Okay.

23          MR. HOWARD: The Government would call Agent  
24          Matthew Stevenson.

25          THE COURT: Raise your right hand, please.



(Oath administered.)

THE COURT: Okay.

MATTHEW STEVENSON

called as a witness, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOWARD:

Q. Agent Stevenson, where do you work?

A. The U.S. Secret Service.

Q. Are you familiar with the case involving James C. McWhorter?

A. Yes, I am.

Q. Have you been one of the primary agents on that case for --

A. The last two years.

Q. And are you familiar with the spreadsheets that we've been referring to today as Exhibit A, Exhibit B, and Exhibit C?

A. Yes, sir.

Q. Have you worked with various stores, Wal-Mart and others, and other investigators, in trying to marshal the data that appears in these spreadsheets?

A. Yes, sir, I have.

Q. I want to walk through those in, hopefully, a methodical manner.

1 I'm going to start with Exhibit A, which is the summary  
2 sheet. It has a series of stores listed and some totals at  
3 the bottom.

4 Do you have that document in front of you?

5 A. Yes, sir, I do.

6 Q. The first line entry there refers to the victim  
7 Wal-Mart. I'm going to leave that to one side for the moment  
8 and focus on the other stores listed below there.

9 THE COURT: All right. Excuse me. Is this  
10 Document 487-1? I'm trying to --

11 Mine is not marked with an exhibit number that I see, so  
12 I'm trying to identify which sheet you're --

13 MR. HOWARD: It is the first exhibit to the  
14 Government's *Sentencing Memorandum*. So it should be --

15 With ECF, Your Honor, it should be stamped -1 at the  
16 bottom.

17 THE COURT: Well, mine says Document 487-1 at the  
18 bottom. It's the one where you have a total actual loss,  
19 total from attempted passes at Wal-Mart.

20 MR. HOWARD: Yes. I believe 487 is the document  
21 number for the memorandum. And then the -1 refers to the  
22 first exhibit; -2 would be the second exhibit.

23 THE COURT: All right.

24 MR. HOWARD: I refer to them in my memorandum by  
25 letter, but yes.

1 THE COURT: That's A.

2 MR. HOWARD: Correct.

3 THE COURT: Okay.

4 Q. (By Mr. Howard) Focusing on the stores and the entities  
5 that appear below Wal-Mart, where did the information for the  
6 actual loss for those stores come from?

7 A. This was a cumulative effort from local police  
8 departments who responded to these stores at the given time  
9 and actually recovered the check from these stores.

10 Q. So for the losses that are intended, is there an actual  
11 recovered check that some local law enforcement agency  
12 obtained?

13 A. Yes, there is.

14 Q. Do those numbers --

15 Again, for those local stores, what I'm referring to as  
16 local stores, does that reflect any intended loss or  
17 attempted loss?

18 A. No, sir.

19 Q. Why not?

20 A. To my knowledge, the local stores did not contract with  
21 Certegy, as in the example of Wal-Mart, who actually tracked  
22 some of those checks.

23 In addition, it doesn't take into the fact that local  
24 stores had no process or means for tracking checks that were  
25 declined.

1 Q. So, for example, the first local store listed there is  
2 Smithville Foods. Had there been a check and the defendant  
3 or one of his co-conspirators tendered the check to cash at  
4 Smithville Foods but was not successful, would that be  
5 reflected here?

6 A. No, sir.

7 Q. Now, you stated that the information here came from some  
8 local law enforcement agencies; correct?

9 A. Correct.

10 Q. As the Secret Service agent overseeing the broader  
11 federal investigation, did you have to rely on the police  
12 work of some of these local agencies?

13 A. Yes, I did.

14 Q. And so if a check had been successfully passed at a  
15 local store and had been reported to the local police, but  
16 that local police department, for whatever reason, didn't  
17 connect it with this investigation, would you have known  
18 about it?

19 A. No, I would not.

20 Q. And, I guess, in the same respect, if they never  
21 reported it to the local police, you wouldn't have learned  
22 about it either.

23 A. Correct.

24 Q. So the figures that appear for those local stores, below  
25 Wal-Mart, reflect only the recovered actual checks that were

1       cashed at those stores?

2       A.    Yes.

3       Q.    Let's turn then to Wal-Mart, which the total appears  
4       there at the top. \$85,819.94. But the detail data appears  
5       in the second spreadsheet referred to as Exhibit B, but which  
6       is likely 487-2 for the Court.

7            I want to talk about how that spreadsheet was developed.  
8       Is it fair to say that it was a several-step process?

9       A.    Yes, sir, it was.

10      Q.    Let's talk about that.

11           How did that process begin? How did you -- how did the  
12      data that eventually formed this spreadsheet first come into  
13      life?

14      A.    Again, it was a cumulative effort from local police  
15      departments. As they gained suspect data or information,  
16      they just compiled a big sheet -- a spreadsheet, per se -- of  
17      that information; and, in turn, submitted all that  
18      information collectively to Wal-Mart, whether it, in fact,  
19      included information pertaining to McWhorter or somebody else  
20      outside the investigation.

21      Q.    When did that initial submission to Wal-Mart occur?

22      A.    Sometime in early 2006.

23      Q.    Were all the details and all the components of the  
24      conspiracy as charged in this case -- were they known in  
25      early 2006?

1 A. No, sir. They were not.

2 Q. And that submission --

3 Did the Secret Service make that submission?

4 A. No, sir. We did not.

5 Q. That was done by local police?

6 A. Yes, it was.

7 Q. And as a result of that information, what did Wal-Mart  
8 do with that information, as you understand it?

9 A. As a result, they queried the database that they had in  
10 place, with the MICR line or the account and banking  
11 information, and cross-referenced their system with the data  
12 presented by local police departments, to come up with a  
13 spreadsheet which they based or thought contained some  
14 information that might be pertinent to the investigation.

15 Q. Again, this is that 2006 time frame?

16 A. Yes, sir.

17 Q. And the total of that original inquiry, the total of  
18 that first spreadsheet, was this number in the range of  
19 \$280,000 or \$275,000? Is that about right?

20 A. 274, I believe. Yes, sir.

21 Q. And, again, that reflected strictly actual loss?

22 A. Yes, sir.

23 Q. That didn't have anything to do with intended loss or  
24 attempted loss?

25 A. No, sir. At that time Wal-Mart did not actually track

1 attempted passings.

2 Q. So we have this 2006 spreadsheet with a loss. The  
3 actual loss is estimated around \$275,000.

4 Did you then take some steps much later in the  
5 investigation to refine that information?

6 A. Yes, I did.

7 Q. Walk the Court through what you did to refine that  
8 information, to make it more reliable.

9 A. I created several different spreadsheets, of which the  
10 information contained in the spreadsheets were driver's  
11 license information, the names on the checks, alias and  
12 genuine names used.

13 There were several different categories, to include  
14 dates of birth and Social Security numbers that we identified  
15 throughout the investigation.

16 And, again, backtracking here a second, it was a  
17 collective effort from reviewing every piece of paper or  
18 document that we obtained during the investigation, taking  
19 that information and instituting that into a spreadsheet to  
20 further be able to verify the information, for example, with  
21 the Wal-Mart spreadsheet, and cross-check that information.

22 And, again, we just created several spreadsheets of  
23 information that we actually physically obtained during the  
24 investigation from local police departments, from local  
25 merchants, from Wal-Mart, and such.

1 Q. So let's just use the example of one check, so we're  
2 clear. One check that you would have seized in the  
3 investigation.

4 What type of information on that check did you use to  
5 cross-reference against the Wal-Mart database?

6 A. I have one of the spreadsheets in front of me.

7 For example, the name of the check in this example would  
8 be Amy Cannon. It contained all the MICR line information,  
9 the routing number and bank account number, the bank that it  
10 was styled on. Meaning, in this example, it would have been  
11 Bank of America. The amount, the address written on the  
12 check.

13 And if it had a Social Security or driver's license  
14 number or any other particular identifier on that check, I  
15 put that into a database. And then I cross-referenced it  
16 with where I actually had obtained the data from.

17 Q. So one of the many fields you just mentioned that was  
18 cross-referenced against the data that Wal-Mart provided?

19 A. Yes, sir.

20 Q. And did that process then result in an early version of  
21 the spreadsheet that we're referring to as Exhibit B or  
22 Exhibit 2?

23 A. Yes, sir.

24 Q. Was the process you just described difficult?

25 A. Yes. It was very time intensive.



1 Q. How so?

2 A. It took, collectively, probably about three months to  
3 incorporate all the data.

4 If you physically break down the time, probably  
5 somewhere close to three weeks of actual day in and day out  
6 time to make sure that the information I had inputted and the  
7 spreadsheets I created cross-referenced somehow with the  
8 spreadsheet that Wal-Mart created.

9 Q. Do you think it's perfect?

10 A. No.

11 Q. Why not?

12 A. There's potentially several instances where we did not  
13 actually obtain checks or Certegy or Wal-Mart or local law  
14 enforcement may not have obtained a particular check from a  
15 particular co-defendant. Or it could very well be that we  
16 did not obtain that particular alias name or that particular  
17 address of a check that was cashed from a local merchant.

18 Q. Did the sheer amount of data that a large retailer like  
19 Wal-Mart has present any logistical problems?

20 A. Yes, it did.

21 Q. Was the process cumbersome?

22 A. Yes, it was.

23 Q. I want to talk then --

24 Again, staying with Exhibit B or Exhibit 2, there are  
25 certain highlighted rows. Did those highlighted rows have

1       some field, some information, that matched with information  
2       that was on a check that was seized in the investigation?

3       A.    They did.

4       Q.    Do you recall at --

5             Let's focus on the first seven that are on the first  
6       page.  What field matched there?

7       A.    If you'll scroll over to the top of the category that  
8       says ABA, the 644000266 number corresponds with additional  
9       checks that were recovered in the investigation.

10      Q.    Nonetheless, the highlighted rows have been removed  
11      because of the date range; is that right?

12      A.    Yes, sir.

13      Q.    And how do you account for why they appeared there in  
14      the first place?

15      A.    Strictly because it referenced a piece of information  
16      that I had instituted in the spreadsheets that I created.  In  
17      this example, the ABA number.

18      Q.    So despite that ABA number matching, did you take a  
19      further step to refine it and double check it with the  
20      database?

21      A.    Yes, sir.

22      Q.    And is the same process true, there are a few that have  
23      been removed because they were cashed in certain other  
24      places?

25      A.    Yes, sir.

1 Q. Now, one of the things that was raised by Mr. Frensley  
2 is that there are certain ones --

3 I'll refer to one example. Lines 24 and 25, at least,  
4 appear to be duplicitous or largely duplicitous of each  
5 other. I want to ask you about that.

6 From the items that were seized or recovered from local  
7 law enforcement or found on the defendant's computer, were  
8 there multiple copies of the same check?

9 A. Yes, sir. There were multiple copies of the same check  
10 that had identical information throughout.

11 THE COURT: Now, does that mean that those  
12 duplicate copies were cashed --

13 THE WITNESS: No, sir.

14 THE COURT: -- at the same store twice?

15 THE WITNESS: It's a possibility, but it does not  
16 definitively mean that. No, sir.

17 THE COURT: Pardon me?

18 THE WITNESS: There's a possibility that could have  
19 been, but it's not a definitive answer that it was cashed.

20 THE COURT: But you heard Mr. Frensley identify  
21 specifically this Item 24 and 25. It's a check in the amount  
22 of \$498.64.

23 THE WITNESS: Yes, sir.

24 THE COURT: Supposedly, both checks were cashed on  
25 3/6/06, in Nashville. The same store. Apparently, Store

1       No. 688.

2               What do you make of that?

3               THE WITNESS: Like I said, sir, several of the  
4 pieces of information that we recovered show that there are  
5 multiple checks that had the same identical information.

6               The reason I would have left it in the spreadsheet is  
7 because I cannot define if it was just, in this example,  
8 McWhorter or one of the other co-defendants alongside him in  
9 the store.

10              There's a good possibility that there were multiple  
11 people at the same location, at the same time, attempting to  
12 pass checks. That's the reason I left it in there, solely  
13 based on that purpose. Whether they put it in there once,  
14 twice, three, or four different times.

15              THE COURT: Well, for this one would you find it  
16 unusual, though, that at the same store they're passing a  
17 check from Mario Gray -- two checks from Mario Gray in the  
18 same amount of money at the same store?

19              THE WITNESS: I personally would not, because we  
20 found multiple checks that contained the same name, the same  
21 MICR line information, the same check number, throughout the  
22 investigation.

23              My philosophy or my thought was that you could have had  
24 at least two different offenders, co-defendants, in the store  
25 at the same time, attempting to pass the same check.

1           THE COURT: You say they had the same identifiers.  
2 They would have to have different pictures, wouldn't they?

3           They had photographs to go with the driver's licenses.

4           THE WITNESS: Yes, sir.

5           THE COURT: And if they had a different person,  
6 they would have to have a different picture.

7           THE WITNESS: Yes, sir.

8           THE COURT: So that wouldn't be the same  
9 identifier.

10          THE WITNESS: In that example, yes, sir. Correct.  
11 The same identifier on the check is what I'm referring to.  
12 The same --

13          They could have very well used the same ID. They very  
14 well could have used the same Social Security number and so  
15 forth. But the picture, obviously, would have --

16          THE COURT: Had a different picture?

17          THE WITNESS: It would have varied.

18          THE COURT: This doesn't show what time. I guess  
19 if you had a different photo ID, if it was a driver's  
20 license, you could do one in the morning and one in the  
21 afternoon.

22          THE WITNESS: Yes, sir.

23          THE COURT: Okay. Go ahead.

24          THE WITNESS: I have a bit of a different entry,  
25 too, on the account numbers on 24 and 25. I don't know if

1 mine is cut off or not, but it appears that there are  
2 different account numbers written on my sheet.

3 THE COURT: Is that under the column ACCT?

4 THE WITNESS: Yes, sir.

5 THE COURT: Aren't they both 64000046?

6 THE WITNESS: Under the account number, on Line  
7 Item No. 24, you have 100000164. And then directly  
8 underneath that you also have 10770.

9 If you look at Line 25 -- maybe it's just cut off on my  
10 copy -- I have 1000001641. I do not have the 0770 portion of  
11 that account number.

12 THE COURT: I see. I was one column over from you.  
13 I see what you're saying.

14 Okay, Mr. Howard.

15 Q. (By Mr. Howard) In response to the Court's questions,  
16 you mentioned your philosophy of why you did what you did in  
17 these spreadsheets.

18 Did you have to make certain judgments in what to  
19 include, what not to include, and how to format these?

20 A. Yes, I did.

21 Q. And why wasn't it just obvious, the way to do it?

22 A. Well, I think given the circumstances of what we found  
23 through the investigation, it was not necessarily clear to me  
24 that if we found multiple checks with the same identifiers  
25 throughout the check -- it was not clear to me that one

1 person went into one store on a given day, at a given time,  
2 and attempted to cash that check.

3 Q. But even more broadly than that. Not with just the  
4 duplicate check issue, but just more broadly.

5 Did you have to make certain judgments?

6 A. Yes.

7 Q. And my question was: Why wasn't it just obvious, the  
8 one way to do this?

9 Was there a lot of data?

10 A. There is quite an extensive amount of data throughout  
11 the investigation.

12 Q. Let's leave actual loss now and turn to intended loss,  
13 which is reflected in -- I'll refer to it as Government  
14 Exhibit C, which is likely No. 3 on the Court's copy.

15 The information in Exhibit C. Where did that come from?

16 A. That came from a company called Certegy.

17 Q. And what is Certegy?

18 A. Certegy is a check verification system company that  
19 Wal-Mart is contracted through.

20 Q. And what does Certegy do?

21 A. They keep up with checks that are passed and attempted  
22 to be passed through -- in this case contracted through  
23 companies like Wal-Mart.

24 Q. Did you talk to analysts or investigators with Certegy?

25 A. I did. I spoke with an analyst by the name of Al

1 Pascual.

2 Q. Is it your understanding whether Certegy captures every  
3 single attempted check -- every check attempted to be passed  
4 at Wal-Mart?

5 A. They do not.

6 Q. Just a portion of them?

7 A. Yes, sir.

8 Q. And with the information provided by Certegy --

9 Well, let me ask it this way. What information did you  
10 give to Certegy for them to create this?

11 A. I gave them the same spreadsheets that we referred to  
12 earlier. That included the MICR line information, the names  
13 on the checks, the identifiers that we had recovered from  
14 this investigation.

15 Q. In speaking with people from Certegy, do you know if  
16 they were able to use all of that information to  
17 cross-reference against their database, or only some of it?

18 A. Just a portion of it.

19 Q. And what was the portion?

20 A. Driver's license and Social Security number.

21 Q. So if there was a check passed by one of the defendants  
22 in this case that had one of the known bank account numbers,  
23 the MICR line information, known to be fraudulent, known to  
24 be in this case, but didn't have a Social Security number or  
25 driver's license number, would it be reflected in Exhibit C?



1       A.     It would not.

2               MR. HOWARD:   Your Honor, those are the questions I  
3     have for Agent Stevenson.   I don't know if Mr. Frensley has  
4     cross examination.   I do have some more argument to make.

5               THE COURT:   Okay.

6                               CROSS EXAMINATION

7     BY MR. FRENSLEY:

8     Q.     Agent Stevenson, with respect to Exhibit A, you  
9     described the process for determining that amount.

10            Isn't it true that one of the reasons why local stores  
11    or smaller operations are often targeted in actions like this  
12    is because they're less likely to be rejected at those  
13    places?

14    A.     I don't know about less likely to be rejected, but they  
15    typically require less identifiers.

16    Q.     Right.   So less identifiers would mean more likely to be  
17    accepted; right?

18    A.     Sure.

19    Q.     And isn't it true that in your investigation of this  
20    matter you were able to ascertain and develop an  
21    understanding about the types of safeguards or systems that  
22    Wal-Mart used that would enable you to collect this data?

23    A.     Correct.

24    Q.     And how did the information systems that Wal-Mart used  
25    compare to these smaller operations?

1 A. It's quite a bit more extensive.

2 Q. Right. And as far as any information with respect to  
3 unsuccessful attempts to cash checks at any of these smaller  
4 locations, you can't tell the Court about any single one  
5 attempt, can you?

6 A. That's correct. Not unless it was in a local police  
7 report.

8 Q. Right. So if you were to give a number or if there was  
9 to be a number attributed to attempted checks at these local  
10 stores, it wouldn't be anything more than a guess at this  
11 point; right?

12 A. Yes, sir.

13 Q. Now, one of the other items that's listed on that  
14 Exhibit A is an amount of loss to the Tennessee Department of  
15 Correction. Do you see that?

16 A. Yes, sir, I do.

17 Q. You're familiar with what that loss is about; right?

18 A. Yes, sir.

19 Q. And those were payroll checks drawn off the accounts of  
20 the Tennessee Department of Correction?

21 A. Yes, sir.

22 Q. Okay. Those payroll checks were cashed somewhere,  
23 weren't they?

24 A. Correct.

25 Q. Isn't it true that those TDOC checks were cashed at

1 Wal-Mart?

2 Didn't your investigation reflect that the TDOC checks  
3 were cashed at Wal-Mart?

4 A. I don't recall specifically, off the top of my head.

5 Q. Do you recall where they were cashed?

6 A. No, sir, I don't.

7 Q. Okay. If they were cashed at Wal-Mart, then that loss  
8 to the TDOC would be reflected again in the loss to Wal-Mart,  
9 wouldn't it?

10 A. Right. Assuming they caught the check, yes, sir.

11 Q. Well, assuming that that check was a payroll check that  
12 was in the spreadsheet; right?

13 A. Right. Assuming they used one of the identifiers that  
14 they had given them at the time.

15 Q. Assuming that one of those payroll checks was cashed at  
16 one of those local stores, then it would be reflected in the  
17 loss to the local store; right?

18 A. As long as we found the check. Yes, sir.

19 Q. So to the extent that the TDOC checks are reflected  
20 either in the Wal-Mart loss or the local check loss, then  
21 that 7,000 plus dollars is counted twice, in effect; right?

22 A. I would have to go through the spreadsheet. I don't  
23 know that it's in the Wal-Mart spreadsheet.

24 Q. But if that's the case, then you have an overstatement  
25 by \$7,000 plus ; right?

1 A. Yes.

2 Q. Okay. Let's talk about the Wal-Mart documentation that  
3 you described here.

4 I asked you a question earlier about some of the systems  
5 that Wal-Mart has in place. Isn't it true that one of the  
6 systems --

7 I think I remember somebody testifying at trial that  
8 Wal-Mart had a limit on the amount of money that you could  
9 cash in a check. Isn't that right?

10 A. Yes, sir.

11 Q. Okay. So you couldn't cash more than a certain amount  
12 of checks at Wal-Mart over a given time; right?

13 A. I think that was my understanding, yes.

14 Q. Do you remember, wasn't it --

15 It was either \$1,000 a week? Wasn't that the number  
16 that you have a recollection of?

17 A. I don't recall the number off the top of my head.

18 Q. Okay. But there was a number that you couldn't exceed  
19 at Wal-Mart for a given individual; right?

20 A. I think it was --

21 I think it was on a per day basis.

22 Q. Okay. But you don't recall that per day basis being  
23 \$1,000 per day?

24 A. No, sir.

25 Q. Okay. Now, isn't it also true that one of those systems

1       that Wal-Mart has in place won't allow for the cashing of a  
2       duplicate check?

3       A.    I'm not sure on that.

4       Q.    Okay.  You don't think that if somebody tries to cash  
5       the same check once, it goes through, and then you try it  
6       again, it's not going to somehow raise a flag or otherwise  
7       not be accepted by the system?

8       A.    No.  That's not my understanding of it.

9       Q.    Your understanding is that they can run a check through,  
10      cash it, and then run that same check through again and cash  
11      it again?

12      A.    Well, my understanding is the way they do it is it reads  
13      the MICR line information.  If the information is correct and  
14      valid, then they make an effort to cash the check.

15      Q.    So you really think that at Wal-Mart if they run a check  
16      through and it's accepted, they pay you the money, they can  
17      take that same check, run it through again, it would be  
18      accepted again and they would pay the money again?

19      A.    Not the same check.  But if they presented a new check  
20      with the same information on it, I believe that's probably  
21      distinctly possible.

22      Q.    Okay.  Were you able to recover actual checks from  
23      Wal-Mart?

24      A.    No.

25      Q.    Okay.  Only the data behind the information that you put

1           together?

2           A.    Yes, sir.

3           Q.    Now, with respect to this entry that was described here  
4           at Items 24 and 25, the Mario Gray entry. My copy was  
5           redacted, so I'm not sure about that account number issue you  
6           were --

7                   THE COURT:   Which exhibit is this?

8                   MR. FRENSLEY:   Exhibit B, Your Honor. Entries 24  
9           and 25. The Mario Gray check.

10           Now --

11                                   (Document handed to counsel.)

12                   MR. FRENSLEY:   Okay.

13           Q.    (By Mr. Frensley) Now, you testified that you left  
14           these two items in, even --

15                   Well, you'll agree with me that across the spreadsheet,  
16           with the exception of that issue that you described regarding  
17           the account number, that these appear to be identical; right?

18           A.    Yes, sir, they do.

19           Q.    Okay. And so you said that the reason that you left  
20           them in was because it's possible that it could have been two  
21           people cashing the same check at the same time.

22                   Is that what your theory for leaving that in is?

23           A.    I don't know about the same time, but definitely within  
24           a pretty close proximity.

25           Q.    Okay. And these don't have -- like the attempts that we

1       have, these don't have a time when they were cashed on them,  
2       do they?

3       A.    No, sir.

4       Q.    All right. I just wanted to make sure that wasn't on a  
5       copy that I didn't have. Okay.

6            So other than that possibility, you don't have any  
7       information to refute that these are duplicate entries of the  
8       same transaction?

9       A.    No, sir. I don't.

10      Q.    Now, you testified a little bit about the process and  
11      about how time consuming it was and the efforts that were  
12      made. But you don't regret --

13            You don't disagree that the numbers have continued to  
14      significantly decrease over time; right?

15      A.    Yes, sir.

16      Q.    And that's because it is clear that there were items  
17      that were included at various points in time that were not  
18      attributable to this conspiracy; correct?

19      A.    Yes, sir.

20      Q.    And the reason for that is because initially you tried  
21      to cast the web or the net as wide as it possibly could be;  
22      correct?

23      A.    Yes, sir.

24      Q.    And as a result, it captured things that weren't related  
25      in any way whatsoever to this conspiracy; correct?

1 A. Yes, sir.

2 Q. And it's likewise possible, given the type of  
3 identifiers that you talked about that link things, that  
4 there are still items included here that aren't attributable  
5 to this conspiracy; correct?

6 A. There's a possibility. Yes, sir.

7 Q. Okay. Now, you said you prepared these spreadsheets?  
8 Or did somebody else do it?

9 A. The Wal-Mart spreadsheet that you see in front of you  
10 and the Certegy spreadsheet were a combination of their  
11 efforts.

12 Q. So they just gave it to you?

13 A. Correct.

14 Q. In this format; right?

15 A. Correct.

16 Q. So with respect to my addition of the various fields,  
17 you don't --

18 Do you have a position? Do you know whether the numbers  
19 that are reflected are accurate or not?

20 A. In the spreadsheets that you see today, I believe that  
21 those are the most accurate figures.

22 Q. But do you recall earlier, when I was going through the  
23 objections, I indicated that it was my belief that the  
24 highlighted areas weren't properly added, that the number  
25 wasn't correct?



1           Do you know one way or the other about the numbers?

2           A.    I heard your argument this morning.  Yes, sir.  And it's  
3           definitely outside of the time parameter that the conspiracy  
4           happened.  At least Items No. 1 through 7 were.

5           Q.    I'm speaking just of the math.

6           Do you know?  Did you ever double check their math in  
7           any respect?

8           A.    Yes, I did.

9           Q.    Am I right?  Is that number wrong for the highlighted  
10          areas?

11          A.    Without going back through it with a calculator, I'm not  
12          sure.

13          Q.    That's fine.

14          Now, with respect to the attempted loss.  You testified  
15          that Certegy doesn't capture all of the checks that are  
16          passed at Wal-Mart; right?

17          A.    Correct.  That's what I was told.

18          Q.    What you were told is that what they capture is payroll  
19          checks passed, not personal checks; correct?

20          A.    Correct.

21          Q.    Okay.  But they do, in that sense, capture the payroll  
22          checks that are cashed there; right?

23          A.    Most of them.

24          Q.    Okay.

25          A.    Not all of them.

1 Q. Okay. And in this particular case, based upon your  
2 investigation and all your work with the various matters, the  
3 checks that were passed at Wal-Mart were, in fact, payroll  
4 checks; right?

5 A. It appears most of them are. Yes, sir.

6 Q. Yes. They didn't pass personal checks at Wal-Mart;  
7 right?

8 A. Not that I can tell.

9 Q. So of the payroll checks that were passed, those were  
10 the kinds of items that were specifically captured by  
11 Certegy; right?

12 A. It would appear so.

13 Q. Okay. Now, I may have misunderstood this or misheard  
14 you. But I guess my question is, you've testified that you  
15 heard my argument earlier with respect to the duplication of  
16 entries on this; correct?

17 A. Yes, sir.

18 Q. And specifically, like for example at Spreadsheet C,  
19 Lines 12 and 13, those are --

20 That's the example I used with the Court.

21 A. Yes, sir.

22 Q. Do you have a position, with respect to the philosophy  
23 that you utilized, as to why you believe that these are  
24 multiple unrelated attempts, as opposed to attempts within  
25 five seconds that were just the same check being attempted to

1 be run through by the cashier?

2 A. No. Only what I alluded to earlier as a possibility.

3 It's also a possibility that you're correct. It could  
4 have been that the cashier ran it through at the same time.  
5 But I had information that suggested --

6 Because we found so many checks that were identical in  
7 nature, duplicates of so many checks that were identical in  
8 nature, I had to include the possibility that there were  
9 multiple people in the store attempting to cash the checks.

10 Q. So as you sit here today, you don't have any evidence to  
11 support your theory that these are attempts made by different  
12 people, different situations; right?

13 A. No, sir.

14 Q. And you think that my explanation is just as probable as  
15 what you've suggested; right?

16 A. Yes, sir.

17 MR. FRENSLEY: If I could have just a moment, Your  
18 Honor.

19 (Discussion held off the record.)

20 Q. (By Mr. Frensley) You were talking about why it is that  
21 you used that philosophy. And you discussed about finding  
22 these duplicate checks.

23 So I understand that during the course of the  
24 investigation, you found duplicate checks; right?

25 A. Yes, sir.

1 Q. And isn't it true that with respect to those duplicate  
2 checks that the reason they were duplicated is because there  
3 were problems with the various checks?

4 In other words, there might be an issue with the MICR  
5 information, there may be an issue with the formatting or  
6 something like that. Isn't that correct?

7 A. I have no way to verify that. The checks looked  
8 identical in every facet to me.

9 Q. In the course of your investigation did you find any  
10 situations where there were two identical-looking checks that  
11 were actually cashed?

12 A. I don't believe so. No, sir.

13 MR. FRENSLEY: That's all I have, Judge.

14 THE COURT: Anything further, Mr. Howard?

15 MR. HOWARD: Not with the witness, Your Honor.

16 THE COURT: Okay. Thank you.

17 (Witness excused.)

18 MR. HOWARD: May I have one minute to talk with  
19 Mr. Frensley?

20 THE COURT: Yes.

21 (Discussion held off the record.)

22 MR. HOWARD: Thank you, Your Honor.

23 Before I turn to my overall remarks, what I was  
24 conferring with Mr. Frensley about was one of the issues was  
25 just a strictly arithmetic issue with the highlighted rows.

1 Leaving aside Mr. Frensley's objections about other ones,  
2 just whether there was an arithmetic factor.

3 I asked a paralegal in my office to recalculate those.  
4 I feared that maybe there was an error in the formula. There  
5 was. And so for the highlighted portion, the arithmetic  
6 portion of it, I agree that those highlighted portions add up  
7 to --

8 THE COURT: Now, are you on Exhibit B?

9 MR. HOWARD: I'm on Exhibit B, yes.

10 If you add up the highlighted portions that the  
11 Government agreed to deduct, there was an arithmetic error.  
12 And the total of the highlighted rows, which includes Rows 1  
13 through 7, Row 30 and 31, Row 141, and then Rows 144 through  
14 156, the total of those highlighted rows --

15 THE COURT: Give me those again. 30, 31. What was  
16 the next one?

17 MR. HOWARD: 141, and then 144 through 156.

18 The total of those highlighted rows is \$12,047.02.  
19 Deducting that from the \$96,000 that was the original total,  
20 the new total, and what the Government suggests is the --  
21 maintains is the actual loss to Wal-Mart, is \$84,096.38.  
22 \$84,096.38.

23 And for what it's worth, Your Honor, because I didn't  
24 ask him on the stand, that portion of the arithmetic done  
25 was, unfortunately, done by my office, not by Agent

1 Stevenson. So any criticism of one's math falls to me.

2 THE COURT: So the parties agree, is this correct,  
3 as to the actual loss it's \$84,096.38?

4 MR. HOWARD: I'll let him speak for himself. I  
5 think Mr. Frensley suggests there were other deductions, as  
6 well.

7 THE COURT: All right. Mr. Frensley.

8 MR. FRENSLEY: That's correct, Your Honor.

9 We believe that there should be an additional \$1,800.27  
10 deducted. And those are the items that I went through with  
11 the Court.

12 THE COURT: And that's the total of those  
13 additional items that you pointed out?

14 MR. FRENSLEY: That's correct, Your Honor.

15 THE COURT: Okay. Now, that's all as to the actual  
16 loss.

17 Now, as to the intended loss. Mr. Frensley, you  
18 identified several that were duplicates. The Government's  
19 position as to that was 118,064.89. And you have identified  
20 from Exhibits B and C, what I added, another 2,397.

21 MR. FRENSLEY: Your Honor, it was \$35,401.15. That  
22 was the total of the items --

23 THE COURT: I'm talking about your intended loss.

24 MR. FRENSLEY: Right, Your Honor.

25 THE COURT: Okay. We didn't talk about all those.

1       Those that we talked about, I think, if I calculated them  
2       right, it was like \$2,400.

3               MR. FRENSLEY: That's right, Judge.

4               THE COURT: But in your paper you say there were  
5       these others --

6               MR. FRENSLEY: Right.

7               THE COURT: -- that added up to \$35,401.15.

8               MR. FRENSLEY: That's right.

9               MR. HOWARD: As this recent colloquy indicates,  
10       we've spent a fair amount of time in minutia the last 45  
11       minutes or so.

12              What I would like to do is step back and go to what I  
13       think the fundamental task before the Court is, which is to  
14       determine not whether Line 147 is in or out because of this  
15       judgment or that judgment, but the Court's task is what is a  
16       reasonable estimate of loss. What is the reasonable estimate  
17       of loss?

18              These spreadsheets, Exhibits A, B, and C, and all the  
19       lines on there, are one tool, but only one tool, that the  
20       Court has. It's one piece of evidence that the Court has to  
21       make that determination of what a reasonable estimate is, but  
22       it's not the only one.

23              These, I think, are the product, as Agent Stevenson  
24       testified, of a rather painstaking process that is, by any  
25       account, difficult and imperfect. But, again, it's not the

1       only evidence the Court has.

2               For example, the Court has the defendant's own admissions  
3 before it. We highlighted in our memorandum the defendant's  
4 early estimate of what the overall loss was was several  
5 factors higher than this. Over \$3 million.

6               We also have co-defendants' admissions about the breadth  
7 and the scope of this conspiracy. More specifically, eight  
8 other co-defendants came before this Court, pled guilty, and  
9 pled guilty to an amount of loss over \$300,000. That is an  
10 admission that, in their view, over \$300,000 is a reasonable  
11 estimate of loss. And they were charged with that.

12              Since that time, again, there's been testimony now.  
13 There's been refinements and more refinements to these  
14 specific numbers. But as we point out in our paper and as  
15 Agent Stevenson testified, these are the ones that can  
16 definitively be tied down. Far beyond the level of proof  
17 required, can definitively be tied down in terms of actual  
18 loss.

19              And, as Your Honor heard, there is a very strong  
20 likelihood that these are all underestimating. In other  
21 words, my fundamental point is this is a floor, not a  
22 ceiling. These spreadsheets are a floor, not a ceiling.

23              And when you factor in all this other evidence, when the  
24 Court comes to --

25              Let me talk first about actual loss. The actual loss



1 from the stores is not really in debate. I think the numbers  
2 for Wal-Mart are largely not in debate. Largely not in  
3 debate. It's around \$84,000. If you subtract Mr. Frensley's  
4 additional items, it's down to about \$82,000. Those numbers,  
5 it seems to me, are largely not in dispute.

6 But again, a floor, not a ceiling, based on the other  
7 evidence the Court has heard at the suppression hearing and  
8 at the week-long trial and at the sentencing hearings and  
9 other hearings of the co-defendants.

10 Turning to the intended loss. There's been a great deal  
11 of comment about the repetitious line items. These quick  
12 sort of serial cashing of what appears to be the same check.

13 The bottom line is we just don't know. There is no way  
14 to know for sure what has happened. But what the guidelines  
15 are intended to do with intended loss is it doesn't have to  
16 be something that's even possible, it has to be what is  
17 intended.

18 And the distinction here is if one defendant walks in  
19 and tries to cash a check once -- a \$500 check, let's say --  
20 that intended loss -- and it's rejected, that intended loss  
21 is \$500. But if he goes in and runs it four times, under the  
22 other view it would be \$2,000.

23 Now, I'm not -- the Government is not contending,  
24 necessarily, that the \$2,000 versus \$500 is correct. The  
25 point is there's a quantum of -- a quantum of loss that

1       should be reflected in the greater conduct of the person who  
2       tries it over and over again.

3               And the Court has certainly heard lots of testimony  
4       about this ongoing refinement of the criminal scheme to try  
5       to get Wal-Mart to cash these checks, to see what's working,  
6       what's not working. You know, whether we need this ID or  
7       that ID. What could it be? And that, I think, is reflected  
8       in the intended loss.

9               Leaving aside there's no intended loss for the local  
10      stores; which, again, the evidence before the Court is there  
11      almost surely were attempts. Mr. Vincent, Mr. Hampton, and  
12      Mr. Kennedy all testified regarding their efforts at these  
13      stores. And they certainly weren't all successful.

14              So I think in terms of actual loss, the \$84,000 number  
15      that we're talking about has been well established and is  
16      largely -- is largely undisputed.

17              With respect to the intended loss -- again, using this  
18      as only a floor, not a ceiling, there is still abundant proof  
19      before the Court that the intended loss here is such that  
20      when you combine the two, it's well over \$200,000.

21              We've taken a conservative estimate on each one of  
22      these. And when those are combined with the admissions  
23      before the Court and the testimony heard at trial, there's  
24      more than adequate evidence to suggest that the amount of  
25      loss -- a reasonable estimate of the amount of loss in this

1 case is between \$200,000 and \$400,000.

2 THE COURT: Okay. Anything further on loss?

3 MR. FRENSLEY: Just briefly, Your Honor, if I may.

4 THE COURT: Okay.

5 MR. FRENSLEY: Your Honor, I must take issue with  
6 Mr. Howard's remark that only what was calculated is what's  
7 definitive. I would say this is anything but.

8 And the Sixth Circuit has spoken on this issue, Your  
9 Honor. In *United States vs. Comer*, they've indicated that  
10 the amount of loss can't be based on speculation.

11 You've heard the testimony of Agent Stevenson. With  
12 respect to the items that we have taken issue with, the only  
13 basis the Government has for those numbers are their  
14 speculation, their belief. Their philosophy that well, you  
15 know, it could have happened this way; so, therefore, we're  
16 going to attribute it to the defendant. And that simply  
17 doesn't meet the burden that's been set forth by the Court.

18 Now, with respect to the numbers -- and, again, because  
19 they're so significant, aside from the fact that the  
20 Government has almost at every single step acknowledged the  
21 inaccuracy of these numbers and acknowledged that it's just  
22 as likely that they continue to contain information that  
23 over-represents loss as opposed to under-represents loss, if  
24 Your Honor accepts the number that the defendant has  
25 submitted, then amount of loss, the total amount of loss, is

1       \$181,746.25.

2           If Your Honor accepts the amount of loss that we went  
3       through with the new spreadsheets that have been provided and  
4       acknowledges the problem with the arithmetic, as well as the  
5       additional \$1,800, and then the intended loss issue that the  
6       defendant has set forth, the Government's number is \$197,200.

7           Under any scenario that puts --

8           THE COURT:   How did you get to that, Mr. Frensley?

9           MR. FRENSLEY:   That would be taking the actual  
10       amount of loss, the --

11          THE COURT:   That's the \$84,096.

12          MR. FRENSLEY:   And then subtracting the \$1,800.  
13       Those were the additional line items that I went through on  
14       Exhibit B with Your Honor.

15          THE COURT:   Okay.

16          MR. FRENSLEY:   And then subtracting the \$35,401.15  
17       of duplicate entries in the intended loss, and then adding  
18       all those numbers together.

19          Again, I would submit that that's --

20          THE COURT:   It's close to the \$200,000 break-up,  
21       but I'm wondering if we need to go over all your \$35,000 of  
22       what you say were duplicates.

23          MR. FRENSLEY:   I'm happy to do that, Your Honor.  
24       As I indicated --

25          If I may get my papers.

1 THE COURT: Now, I will say, from the trial I  
2 remember that there were checks that were the same, except  
3 they had different photographs on them.

4 MR. FRENSLEY: That's right. And I believe they  
5 would have been passed at different locations, at different  
6 times. But again --

7 THE COURT: But that's supposition, too.

8 MR. FRENSLEY: I'm sorry, Your Honor. I don't  
9 follow that.

10 THE COURT: Well, I mean, you're saying that you  
11 have two people that come to Wal-Mart or some other store,  
12 different names, different photographs.

13 MR. FRENSLEY: Right.

14 THE COURT: Maybe the same name, but it could be  
15 different names, but different photographs to match whatever  
16 the name is for the driver's license.

17 But it could be the same payroll check, the same  
18 numbers, the same --

19 MR. FRENSLEY: Exactly. And I think that would be  
20 reflected.

21 I mean, you have examples of that in the spreadsheet,  
22 where you have the same name and the same check amount, but  
23 it's at different stores or different times. There are  
24 plenty of examples of that throughout this information.

25 On Page 3 of my position paper, Your Honor, I set forth

1 the entries that I submit are duplicates --

2 THE COURT: Right.

3 MR. FRENSLEY: -- and are those items that are  
4 within those very short windows on Exhibit C.

5 Again, I'm certainly happy to go through that with the  
6 Court, if you think it would be helpful. I'll represent to  
7 the Court that I've reviewed those a number of times, that  
8 those represent those situations, and that they equal up to  
9 the \$35,401.15.

10 THE COURT: Well, we went over a few of those. We  
11 didn't go over all of them.

12 Have you gone over those, Mr. Howard?

13 MR. HOWARD: Your Honor, I haven't gone over each  
14 of those, the ones that Mr. Frensley is talking about, the  
15 intended loss spreadsheet.

16 I will say this: We're not disputing his math on those  
17 particular line items or that they add up to \$35,000. I  
18 don't think that's the dispute. And I don't think that  
19 really is -- especially the intended loss work.

20 In actual loss, that's down to the penny significant  
21 because that goes into a restitution order. Intended loss is  
22 not going to go to any victim. It's strictly a guideline  
23 function.

24 The Court needs to determine is there sufficient  
25 evidence based on the spreadsheet and all the other evidence

1       that the intended loss is such that it takes it within that  
2       \$200,000 to \$400,000 range.

3               So our position is even if you accept that this \$35,000  
4       should fall out because of duplication, there's still  
5       evidence based on the defendant's own admissions, the  
6       co-defendants' admissions, and what we know generally about  
7       the attempts of the ongoing conspiracy that makes it a very  
8       reasonable estimate that the amount of overall loss, actual  
9       and intended, falls within the \$200,000 to \$400,000 range.

10              I'm not disputing, for purposes of the individual line  
11       items, that those add up to \$35,000. I just don't think  
12       that's the Court's inquiry.

13              THE COURT: Well, for guideline purposes, if you  
14       consider the \$35,400, it would put it just under \$200,000, as  
15       I understand it.

16              MR. HOWARD: For the spreadsheet portion of the  
17       proof.

18              THE COURT: Right. Well, you know, you point to  
19       the defendant's testimony. His testimony, I think, that you  
20       point to is when he was being interviewed by the detectives  
21       at the police department. And I think he was portraying  
22       himself in a bigger role than he actually assumed in this  
23       whole conspiracy. He was bragging. At least that's my  
24       recollection of that interview.

25              Now, are you talking about some testimony at trial? You

1 may want to refresh my memory about that. I don't recall him  
2 testifying about the total amount of checks that they passed  
3 and so forth, or intended to pass.

4 I do, however, think there is a distinction between  
5 attempts and intended. Because if you have one check that's  
6 presented more than one time, it still represents one loss if  
7 it hasn't been --

8 I mean, you're trying to get a certain amount of money.  
9 That's the amount of money that's written on the check. And  
10 if you attempted it three times, that still doesn't change  
11 the same amount of money you're trying to get.

12 You're just trying to get that kind of money, that  
13 amount of money. Maybe you don't have enough identification  
14 or maybe your clerk is too wise, until you finally hit  
15 somebody that doesn't raise the question and gives you your  
16 money. But that doesn't mean you multiple it by four.

17 MR. FRENSLEY: I agree, Judge. But in this case, I  
18 think it's more a function of the systems that Wal-Mart used.  
19 Because when you look at these checks, they're so -- I mean,  
20 they're within seconds or minutes of each other.

21 THE COURT: The one where you raise where you put  
22 in the check and maybe it didn't go, so they tried it again  
23 within five seconds -- that's kind of a reasonable, I think,  
24 analysis of that one transaction. I don't know how many --

25 Do you have many more of those?



1 MR. FRENSLEY: Yes, Your Honor.

2 And, quite frankly, Your Honor, anticipating the  
3 Government's argument, that's what I tried to do, was look at  
4 only those attempts that were so close in time that that  
5 would be a reasonable explanation.

6 If you look at -- for example, just go two more entries.  
7 Go to 16 and 17 on Exhibit C.

8 THE COURT: Okay.

9 MR. FRENSLEY: And 16 is 1233:34. 17 is 1233:45.  
10 11 seconds apart. And, again, I think that's --

11 Granted, there may be some that are within a minute, a  
12 minute-and-a-half, something like that. But I think those  
13 are reflective of the kind of examples that we've identified  
14 at Page 3 of our position paper.

15 They're just so closely related in time that it wouldn't  
16 even be a reasonable explanation to say, you know, I passed  
17 the check, it doesn't go through, and then someone next to me  
18 passes the exact same check with a different -- It just  
19 doesn't.

20 And, again, it's a close call in terms of the amount,  
21 Your Honor. I think accepting those arguments under either  
22 scenario, it puts Mr. McWhorter in the lower category.

23 And, quite frankly, again, I think Agent Stevenson, to  
24 his credit, his testimony was that --

25 You know, this idea that Mr. Howard suggested, that this

1 is just a floor and there's got to be more out there, that's  
2 not consistent with *Comer*, number one.

3 And Agent Stevenson testified candidly, I think, that  
4 anything greater than these numbers would just be a guess.  
5 And I don't think a guess is enough to do it, Judge. Even  
6 with the admissibility of hearsay, even with the lesser  
7 standard of proof, I just don't think they meet the burden.

8 And for those reasons, Your Honor, we submit that the  
9 proper amount of loss should be reduced to the next lower  
10 level.

11 THE COURT: All right. Let's move on to the next  
12 objection, Mr. Frensley.

13 MR. FRENSLEY: Yes, Your Honor.

14 THE COURT: And that --

15 MR. FRENSLEY: I think the next ones, Your Honor,  
16 we can run through, hopefully, a lot quicker than that.

17 THE COURT: Acceptance of responsibility.

18 MR. FRENSLEY: Yes, Your Honor. And I'll be brief  
19 on this issue. I'm not going to belabor the point.

20 I would submit that there is a well-established body of  
21 law under 3E1.1 that acceptance is not automatically  
22 precluded even though it wouldn't be applicable in a  
23 situation.

24 I think if Your Honor will recall this case and the  
25 whole manner in which it came about, this falls within the

1 exceptions that the guidelines talk about with respect to  
2 acceptance of responsibility. The reason why this case went  
3 to trial, number one, was related to the suppression issue  
4 with respect to Counts 1 through 4.

5 Your Honor will recall we had a two-and-a-half,  
6 three-day suppression hearing. Mr. McWhorter couldn't, as  
7 the Government submits, just say I'm guilty and preserve that  
8 issue without some type of agreement. So he went to court to  
9 preserve that issue.

10 There is an abundance of case law that talks about the  
11 adjustment being allowed where the trial is to challenge and  
12 preserve a constitutional challenge with respect to the  
13 admissibility of evidence or the applicability of statutes to  
14 his conduct.

15 You'll recall likewise, Your Honor, at trial  
16 Mr. McWhorter offered no serious proof to factual guilt with  
17 respect to Counts 1 through 4 in this case. The only dispute  
18 was as to Count 5.

19 And it was probably beating a dead horse on my part, the  
20 way that I went at that. But it was very, very clear that  
21 the issue was this William Blake ID that we suggested that  
22 Mr. Vincent made, that my client had nothing to do with.

23 So setting aside Count 5. With respect to Counts 1  
24 through 4, the only reason to go to trial was to preserve  
25 that issue of the suppression issue.

1           And likewise, Your Honor, I think Mr. Howard makes an  
2 allusion to it in his position paper. That the interstate  
3 nexus argument that I raised on the Rule 29 motion -- again,  
4 I think under *United States vs. Fells* and many other cases  
5 that talk about challenging the applicability of a statute to  
6 particular conduct, I think this is more akin to what that  
7 issue was.

8           I didn't really challenge the factual guilt. Your Honor  
9 saw the numerous statements that were played in evidence.

10          So we would submit that this is one of those cases that  
11 is outside the heartland. That with respect to Counts 1  
12 through 4 that Mr. McWhorter, through his early statements to  
13 law enforcement, should receive some benefit for acceptance  
14 with respect to those counts.

15          And his decision to go to trial to preserve his  
16 constitutional issue with respect to the suppression, to  
17 challenge the applicability to the interstate nexus  
18 provision, and to dispute Count 5 -- which Count 5, even if  
19 he plead guilty to, he would receive no benefit for  
20 acceptance of responsibility because it's a mandatory  
21 sentence -- that those all support the application of the  
22 adjustment in this case.

23           THE COURT: Okay. Let me hear from Mr. Howard.

24          You put your position in your position paper. I think I  
25 understand it. But if you want to speak briefly about that.

1 I'll just say that Mr. McWhorter, my recollection is he  
2 contested each of the four counts.

3 I agree, Mr. Frensley, that there was an additional  
4 thrust with regard to Count 5 and identifying who actually  
5 was involved in that out-of-state driver's license. It was  
6 Kentucky, I believe. Was it Kentucky, where the guy --

7 Where was it?

8 MR. HOWARD: He was from Kentucky.

9 THE COURT: Yes.

10 MR. HOWARD: I believe it was a Tennessee license.

11 THE COURT: Anyway, there was a lot of attention  
12 paid to that. But I didn't think that Mr. Frensley let up on  
13 any of the top four, the other four counts either. He was  
14 active, as was Mr. McWhorter, on all of them.

15 So, in my view, he put the Government to the test on all  
16 four -- all five counts. There was particular emphasis on 5  
17 because of its ramifications with the automatic statutory  
18 two-year sentence that is to be served consecutive to any  
19 other sentence.

20 So I more or less agree with your position paper. But  
21 if you want to point out anything else for the record, you  
22 are welcome to do it.

23 MR. HOWARD: No. I agree with everything the Court  
24 said.

25 I would just note that as far as the trial, there were

1 no stipulations to evidence, there was extensive cross  
2 examination of Government witnesses, there was significant  
3 argument on interstate commerce and others.

4 I don't think under any interpretation, this defendant  
5 accepted responsibility. He challenged, as is his right,  
6 every piece of evidence, every argument, at every stage of  
7 his proceeding. To come now and seek acceptance of  
8 responsibility is just simply not appropriate.

9 And the idea that one can take responsibility for giving  
10 statements to law enforcement and then simultaneously be  
11 attempting to undermine that and not preserve it is just  
12 completely counterintuitive.

13 So we respectfully submit he did not accept  
14 responsibility and should not receive a reduction.

15 THE COURT: Thank you, Mr. Howard.

16 The next objection by Mr. Frensley is with regard to the  
17 enhancement for the authentication feature, which is  
18 recommended under the advisory guidelines.

19 There is an enhancement for sophisticated means, but  
20 there is another enhancement for if the offense involved an  
21 authentication feature or the production of authentication  
22 features. And, of course, there was an authentication  
23 feature on the Tennessee driver's license and there was an  
24 attempt to produce an authentication feature on the false  
25 driver's licenses that were produced in this case.

1 MR. FRENSLEY: Thank you, Your Honor.

2 With respect to this issue, as Your Honor noted, there  
3 is already an adjustment for sophisticated means that I would  
4 submit takes into account much of the same information that's  
5 alleged to be the basis for the application of this  
6 enhancement feature.

7 But with respect to this issue, Your Honor, there are  
8 two arguments that we advance as to why this enhancement  
9 should not apply. The first is that the hologram is the  
10 feature at issue in this case. And in this case the hologram  
11 that was issued was not a real authentication feature. It's  
12 a false authentication feature.

13 The guideline talks about referencing to 18, USC,  
14 Section 1028 for the definitions of these terms. And 1028  
15 defines a false authentication feature as opposed to a real  
16 authentication feature. There are two separate definitions  
17 for those.

18 And to the extent that Application Note 9 defines it as  
19 it's defined in 1028, then our argument initially is that by  
20 virtue of it being false, it doesn't fall within the terms of  
21 the statute or the terms of the guideline for which it should  
22 count.

23 The second argument that we advance with respect to this  
24 issue is a double counting argument, Your Honor.

25 We have reviewed and looked at cases that the Government

1       has cited and set forth with respect to the efforts that we  
2       made with the probation officer to try to resolve these  
3       issues before this hearing. And it appears, Your Honor, that  
4       an important distinction between this case and all of those  
5       other cases --

6               And, in fact, I'll submit that I haven't been able to  
7       find any cases where the enhancement is applied where there  
8       is an underlying conviction for production and possession of  
9       the false identification. It seems to me that that becomes  
10      an important issue here.

11             Mr. McWhorter's convictions in Counts 1 through 4 have  
12      as elements of those offenses an inclusion of the false  
13      authentication features. They include production and  
14      possession of false identification documents. And the false  
15      authentication features were necessary to appear to be issued  
16      by the state under the terms of the statute.

17             So, in other words, for Mr. McWhorter to be convicted of  
18      those particular offenses, they would, under our submission,  
19      necessarily require that the documents include authentication  
20      features that make them appear to be issued by the state.

21             And so we submit that likewise, in support of this, with  
22      respect to looking at the aggravated identity theft  
23      guidelines at 2B1.6, Application Note 2, it likewise talks  
24      about the double counting and not using the factors when the  
25      means of identification is an element of the underlying



1 offense.

2 So in this particular situation, again, Your Honor,  
3 there are the two arguments. As I understand, the probation  
4 officer's opinion is that he interprets the guideline, as I  
5 believe the Government does, to include the attempt to make  
6 it look real.

7 But, again, necessarily for him to be convicted of the  
8 underlying offense, whereby he is required to make those  
9 documents appear to be issued by the state, they would then  
10 necessarily have to have those authentication features.  
11 Otherwise, they wouldn't appear to be issued by the state.

12 You heard the testimony at trial, Your Honor, about the  
13 various markings and the keys and the things that have to be  
14 looked at for the document to appear to have been issued by  
15 the state. And the hologram was one of those issues, as were  
16 tracking numbers, serial numbers, other items that were  
17 identified by the various witnesses.

18 And so if those items had not been on the documents,  
19 then they would not appear to have been issued by the state  
20 because they wouldn't have looked like a legitimate,  
21 authentic document.

22 So I believe that that's the distinction as to the  
23 application of the guideline and the underlying offense.

24 And to the extent that Mr. McWhorter, unlike any of the  
25 cases cited by the Government and unlike any of the cases

1       that I've been able to discover, included conviction for  
2       production, possession of the identification documents, then  
3       we would submit that to count those same factors as a basis  
4       for enhancement under the guideline would be an impermissible  
5       double counting.

6               And, as a result, Your Honor, we would respectfully  
7       submit that the Court should decline to add the two-level  
8       enhancement for authentication feature.

9               THE COURT:   Okay.   Mr. Howard.

10              MR. HOWARD:   First, Your Honor, I think it's worth  
11      observing that we have addressed this particular enhancement  
12      eight other times.   And in each case, the Court either  
13      applied it or found that it factually applied but chose not  
14      to apply it because of the *Plea Agreement*.

15              But that aside, even on the specific merits of the  
16      defendant's argument, that argument fails and the enhancement  
17      has to apply.

18              First, with respect to whether it's a fake hologram or  
19      whether it's a real hologram.   As we point out in our  
20      position paper, the harm that is sought to be addressed by  
21      the guideline is whether there is this feature that makes it  
22      more authentic, more dangerous, because it's more apt to  
23      succeed.

24              Whether something meets the scientific definition of a  
25      hologram is simply not relevant.   It's whether it served the

1        purpose of a hologram, which here it did.

2                We heard in the statements from the defendant at the  
3        suppression hearing, in the recording, that it shimmered.  
4        Well, that's precisely what a hologram is to do.

5                So I don't think the inquiry is about whether it's a  
6        real -- technically, a real hologram or not. In the same way  
7        that I don't think a watermark would have to be, again, made  
8        with a dandy rule on what paper pulp constitutes a watermark  
9        under the guideline. The harm addressed is the same.

10               Secondly, with respect to double counting. Again, I  
11        think it's a relatively simple concept that gets muddled in  
12        the language of the guideline.

13               You get a certain enhancement for producing a false  
14        identification document. That gets you one level. But then  
15        if you add certain authentication features which makes it  
16        really authentic looking, more authentic looking, more likely  
17        to deceive, you get an enhancement. That enhancement  
18        reflects the enhanced dangerousness of the instrument.

19               Here, that's precisely what we have. These driver's  
20        licenses were particularly good, particularly apt to deceive  
21        because they were really, really real looking because of  
22        these all these authentication features.

23               Now, one of the suggestions was well, it can't be a  
24        false identification document, it can't be a false driver's  
25        license, unless it has an authentication feature; therefore,

1       it's double counting. But I think that argument proves too  
2       much. Because, for example, this would still be a false  
3       identification document if the microscopic print in the  
4       flagpole that appears on the Tennessee driver's license, if  
5       that didn't have the date of birth of a participant or the  
6       driver's license number -- I forget what it is.

7             If it didn't have that, it would still be a false  
8       identification document. But by having that extra  
9       authentication feature -- in my example, the text in the  
10      flagpole -- that makes it more likely to deceive because it  
11      is more authentic looking.

12            In the same way, it would still be a fake driver's  
13      license. It's still a false identification document, whether  
14      it had this real hologram or a piece of foil that is 99% like  
15      a hologram or something else.

16            So the enhancement -- there's no double counting with  
17      respect to that.

18            Finally, the idea that because there's a production  
19      count here that it's double counting. I don't think that  
20      applies either. Again, it proves too much.

21            By definition, no defendant could ever produce a genuine  
22      authentication feature because the only entity that can  
23      produce a genuine one is the DMV or appropriate issuing  
24      agency. So by that reading, that would essentially fall out  
25      of the statute because you could never have that by

1 definition. I don't think that's a reasonable reading.

2 For all those reasons we submit that the Court should  
3 find, as it has in all the other co-defendants' cases in this  
4 matter, that the enhancement applies.

5 MR. FRENSLEY: Your Honor, may I just briefly  
6 address two points?

7 THE COURT: Okay.

8 MR. FRENSLEY: First, Your Honor, with respect to  
9 what the Court has done with respect to co-defendants in this  
10 case. Again, I think it highlights the point that I made to  
11 the Court with respect to the nature of the underlying  
12 offense.

13 As I understand it, each of those defendants plead  
14 guilty to conspiracy. None of them plead guilty to the  
15 substantive counts which Mr. McWhorter is being sentenced  
16 upon, which distinguishes those -- which distinguishes all  
17 the cases that I've explained to the Court my research has  
18 discovered.

19 Secondly, Your Honor, I think that Mr. Howard's argument  
20 that you couldn't ever actually have the authentic features,  
21 it just simply -- it begs the question, Judge. I mean, I  
22 think that is the type of more egregious conduct that  
23 Mr. Howard is saying that the guideline should reach.

24 If someone within the Motor Vehicle Department used the  
25 legitimate actual documentation, used the legitimate

1       hologram, used the legitimate evidence and things that are  
2       utilized in creating a real document, that would be the  
3       greater risk, to follow his argument and the logic of that  
4       argument.

5               So for the reasons we've set forth, we would argue that  
6       this application shouldn't apply as an enhancement for  
7       Mr. McWhorter's case.

8               THE COURT: Is that all?

9               MR. FRENSLEY: Yes, Your Honor.

10              THE COURT: Okay. This section under the  
11       guidelines is found at 2B1.1, subparagraph (b)(10)(A).

12              The previous section, 2B1.1(b)(9)(C), adds two points if  
13       the defendant was participating in this fraudulent scheme and  
14       the offense otherwise involved sophisticated means. And  
15       there is an application note under that section at Footnote  
16       8(B) in the Application Notes that defines *sophisticated*  
17       *means* as especially complex or especially intricate offenses  
18       involving conduct pertaining to the execution or concealment  
19       of the offense.

20              And it lists, for example, a telemarketing scheme;  
21       conduct such as hiding assets or transactions, or both,  
22       through the use of fictitious names, entries, accounts, or  
23       other kinds of sophisticated means.

24              In this case, of course, they used the Tennessee  
25       Department of Corrections, the bank number of the Tennessee

1 Department of Corrections to route these checks; to create  
2 the sophisticated checks, but also to route them, knowing  
3 where they would be presented for payment and so forth.

4 There was also the fact of the materials involving this  
5 plastic and this certain camera they used. All those were  
6 sophisticated means to produce these driver's licenses.

7 There's an additional two-point enhancement if the  
8 offense involved an authentication feature or the production  
9 of authentication features.

10 The authentication feature probably was the hologram  
11 that is mentioned on the Tennessee driver's license, which  
12 must appear. And there are other documents that have  
13 holograms and similar authentication features.

14 It generally means that those documents have a higher  
15 level of security devices that are installed to make sure  
16 that identity theft and security interests are not  
17 duplicated. And if you do duplicate those by involving  
18 authentication features in your process of producing these  
19 fraudulent documents, then that is a level of sophistication  
20 that is above that that's covered that's in subsection  
21 (b) (9) (C) .

22 So if you're duplicating those features on those  
23 important documents -- usually Government documents; not  
24 always, but they're on passports and driver's licenses and  
25 other security devices that are used for identification for

1 law enforcement purposes and other security purposes -- then  
2 there is an enhancement.

3 And the Court believes that that section does apply in  
4 this case because they produced -- Mr. McWhorter was the  
5 expert in producing these authentication features and was  
6 certainly personally involved in trying to duplicate the  
7 Tennessee hologram on the driver's license in this case. And  
8 therefore, the Court believes that it applies.

9 I think the final one was the role in the offense,  
10 Mr. Frensley, and whether or not Mr. McWhorter should receive  
11 the recommended four-level increase because he was an  
12 organizer or leader of this conspiracy which involved five or  
13 more participants.

14 There's another catchall that says or was otherwise  
15 extensive.

16 MR. FRENSLEY: Correct.

17 THE COURT: So you've got two hurdles to jump over.

18 MR. FRENSLEY: I understand, Judge.

19 THE COURT: And, you know, there were just hundreds  
20 of checks distributed over the length of this conspiracy,  
21 which was about --

22 MR. FRENSLEY: I think about nine months.

23 THE COURT: -- about eight months. And it involved  
24 nine people.

25 MR. FRENSLEY: Thank you, Judge.



1           Your Honor, the basis of this argument, just simply put,  
2           relates to the roles of Mr. Kennedy and Mr. Hampton.

3           It's our position, as set forth in the position papers,  
4           notwithstanding the points that Your Honor has set forth,  
5           that Mr. Kennedy, Mr. Hampton, and Mr. McWhorter all brought  
6           something to the table.

7           Albeit slightly different, they were all integral, all  
8           important, and all critical. And to the extent that  
9           Mr. Kennedy and Mr. Hampton didn't receive four points, it's  
10          our position that Mr. McWhorter should not receive four  
11          points, as well.

12          His role, we submit, was no greater or no less  
13          significant or more significant than those individuals. And  
14          I think the trial testimony established that all shared  
15          equally, for the most part, with respect to these matters.

16          Nothing would indicate that the four levels would apply,  
17          but rather that the three-level reduction should -- or  
18          increase should apply to Mr. McWhorter, as opposed to the  
19          four.

20                 MR. HOWARD: I think the defendant's position on  
21          this point is at odds with the entire history of this case,  
22          the evidence at trial, his own admissions.

23          Mr. McWhorter is quantitatively different from  
24          Mr. Kennedy or Mr. Hampton; much less all the other  
25          co-conspirators, many of which were borderline incompetent.

1           Mr. Kennedy brought in some money. Mr. Hampton was  
2 essentially a laborer.

3           By all accounts of those co-defendants and the  
4 defendant's own admissions to the police officers, he was the  
5 driving force here. He was the creative guru. He was the  
6 one with computer expertise. He was the one that  
7 manufactured everything.

8           And we see that not just from the direct evidence, but  
9 also indirectly. When the defendant stopped doing it, wasn't  
10 creating things, the crimes ground to a halt; even when  
11 Mr. Kennedy wanted to keep on doing it. When Mr. Hampton was  
12 arrested, the crimes didn't stop.

13           So there is abundant proof of the defendant's central  
14 role in the conspiracy. He's the creator, the intellectual  
15 driving force for this. He oversaw everyone else, every  
16 other co-conspirator, including Mr. Hampton and Mr. Kennedy.

17           For all those reasons, as we stated in our position  
18 paper, there's ample evidence to apply the four-level  
19 enhancement.

20           THE COURT: The Court believes that the proof in  
21 the case clearly shows that Mr. McWhorter was the brains  
22 behind this outfit. Although he doesn't have any higher  
23 education, he was known to have intelligence about computers,  
24 as well as banking and the process of checks being routed.  
25 And that without him, the conspiracy could not have been

1 carried out.

2 He also was knowledgeable in the type of equipment that  
3 had to be obtained in order to start this fraudulent  
4 activity. He had somebody to fund the operation, but they  
5 funded it because of their confidence in his ability to carry  
6 it off.

7 He also recruited people. And they were impressed with  
8 his knowledge about how this could be successful. And,  
9 indeed, it was successful for a considerable amount of time.

10 So the Court believes that the enhancement does apply.  
11 He was both the organizer and the leader.

12 As Mr. Howard said, later on, after they had met with  
13 considerable success, they seemed to slack off for a while to  
14 enjoy the benefits of their fraudulent activity, to spend  
15 some money by entertaining themselves with drugs and other  
16 things, but then they would bring it back up. But they  
17 needed Mr. McWhorter's involvement and direction and his  
18 input in producing these fraudulent ID documents.

19 So with that, we have a calculation of the offense  
20 level. And the Court's view is that with regard to the loss,  
21 there is speculation and some proof to support that the  
22 conspiracy was larger than what the facts that have been  
23 presented to the Court show.

24 I do think that Mr. Frensley has raised questions about  
25 some of the documentation presented by the Government and its

1 accuracy and the calculations of both the actual loss and the  
2 intended loss, that it's close to \$200,000.

3 After the Government eliminated some checks and conceded  
4 that they were either before or after the date of the  
5 conspiracy or that there were possible duplicates, their  
6 amount comes up to a little above \$200,000. And  
7 Mr. McWhorter's figures, through Mr. Frensley, come up just  
8 under \$200,000.

9 All parties agree that the records are not exact. The  
10 Government has a burden of proving its loss. It must only be  
11 reasonable. That's set forth in the guidelines, too, under  
12 2B1.1. They don't have to prove with exactitude the amount  
13 of loss. They can make a reasonable estimates of the loss,  
14 but it can't be speculation.

15 They do base their estimate on records. The records,  
16 however, seem to be subject to some interpretation. The  
17 Government has agreed that the bottom line, that is the total  
18 amount of the loss, is just something that no one exactly  
19 knows.

20 And the agent, Mr. Stevenson, his response to one of  
21 Mr. Frensley's questions was that Mr. Frensley's explanation  
22 of duplication with regard to the intended loss with such  
23 close time lines of the times within when the checks were  
24 cashed at the same establishments, relating to Wal-Mart, that  
25 Mr. Frensley's explanation of how that may have happened was

1 just as probable as what was proposed in his report and  
2 suggested by Mr. Howard.

3 And on the basis of that uncertain proof, the Court  
4 finds that the amount of loss is \$200,000 or less. I think  
5 the breaking point is must be greater than \$200,000. And the  
6 Court finds that it's less than \$200,000 based on the  
7 reasonable proof.

8 And that would reduce the base offense level -- not the  
9 base offense level but the enhancement for the amount of the  
10 loss to 10 rather than 12.

11 So the quick calculations are that the beginning or base  
12 offense level under 2B1.1, subparagraph (a)(2), is six. That  
13 is that's the base offense level which corresponds with the  
14 statute of conviction, which is Section 1028(a)(1) of  
15 Title 18; also 1028(a)(3) of Title 18 and 1028(a)(5) of  
16 Title 18.

17 The next enhancement suggested in the presentence report  
18 is that the defendant receive a 12-level enhancement because  
19 the loss was greater than \$200,000, but less than \$400,000.  
20 And I've just commented about that.

21 There is evidence to suggest, because of the testimony  
22 at trial, the bragging statements of Mr. McWhorter while he  
23 was being interviewed by the police, and the sheer amount of  
24 those checks and so forth that were found, that there was  
25 more than that. But there is also evidence that the reports

1       upon which those estimates are based have some duplication  
2       and some explanation that brings it just under \$200,000. And  
3       the Government's estimate is that it's just over that.

4       And the Court finds in favor of the defendant based on  
5       the reasonable estimate, so there will be a 10-level  
6       enhancement under 2B1.1(b)(1)(G).

7       Two additional points are added under subsection  
8       2B1.1(b)(2)(A)(i) because there were more than 10 victims but  
9       less than 50 victims. That's not disputed.

10       An additional two points are added because sophisticated  
11       means were used. That's covered under 2B1.1, subsection  
12       (b)(9)(C).

13       And we've just discussed and the Court has found that an  
14       additional two points are added under 2B1.1(b)(10)(A)(ii).  
15       That's also covered in the presentence report in  
16       Paragraph 39. The presentence report explains the  
17       application of that additional two points regarding two  
18       seals, security codes, holograms, and other similar items to  
19       make them appear authentic.

20       Then finally, an additional four points are added  
21       because the defendant was an organizer or leader of this  
22       criminal conspiracy which involved more than five persons.  
23       And the Court also finds that the conspiracy, along with the  
24       activities that took place under the conspiracy were  
25       otherwise extensive. So that four-point enhancement would

1       apply.

2               So the addition of those figures determined by the Court  
3 would add to 26 as the adjusted offense level.

4               There seems to be -- well, there is an objection, I  
5 think, on the criminal history determination, too.

6               Mr. Frensley, the presentence report indicates that he's  
7 in Criminal History Category VI. You believe he should be in  
8 Criminal History Category V, I believe.

9               MR. FRENSLEY: That's correct.

10              THE COURT: I'll hear you briefly on that.

11              MR. FRENSLEY: Yes, Your Honor.

12              Your Honor, the first item is at Page 15 of the  
13 presentence report. Paragraph 49 relates to a conviction for  
14 passing a bad check. That's a conviction out of the state of  
15 Missouri. Liberty, Missouri is where it comes from. And the  
16 presentence report provides Mr. McWhorter with one criminal  
17 history point for that conviction under 4A1.1(c).

18              In that regard, the sentence is counted and excluded,  
19 Your Honor. This check -- or this conviction rather, Your  
20 Honor, I would submit is a sentence that should be excluded  
21 under 4A1 -- I'm sorry, it's 4A1.2(c). I think I said  
22 1.1(c).

23              And there are two bases for counting certain sentences  
24 under that particular provision with respect to misdemeanors.  
25 The first is if the sentence was for a term of probation of

1 more than one year or a term of imprisonment of at least  
2 30 days.

3 And in this case, Your Honor, as the presentence report  
4 reflects, Mr. McWhorter was sentenced to one year of  
5 probation in that case, not more than one year. So under  
6 4A1.2(c)(1)(A) the sentence would not count, being one not in  
7 excess of a year of probation.

8 Then, Your Honor, look to Section (b). That talks about  
9 the prior offense was similar to the instant offense. And,  
10 of course, the instant offense in this case, as Your Honor is  
11 well aware, deals with production of these false  
12 identification documents and fraudulent checks and things of  
13 that nature that are counterfeit in nature. Mr. McWhorter  
14 was charged --

15 And we've had some discussions between myself, the  
16 United States Attorney --

17 THE COURT: Which paragraph is that, Mr. Frensley?

18 MR. FRENSLEY: Paragraph 49 of the presentence  
19 report, at Page 15.

20 THE COURT: Okay. You're still on that first one?

21 MR. FRENSLEY: Yes, Your Honor.

22 THE COURT: Okay.

23 MR. FRENSLEY: That's the one that I'm on.

24 THE COURT: Okay.

25 MR. FRENSLEY: There have been some discussions.



1 The probation officer provided some additional documentation  
2 from Missouri with respect to that particular offense, which  
3 doesn't really illuminate it any further.

4 As a result, Your Honor, I went and looked at the  
5 statute, the Missouri statute for passing a bad check. And I  
6 would respectfully submit that my interpretation of that --

7 It's Revised Statute Missouri, Section 520 -- I'm sorry,  
8 570.120. It's the offense of passing a bad check.

9 I would submit that that is the insufficient funds  
10 statute in the state of Missouri. And that, Your Honor, is  
11 consistent with my understanding of what this particular  
12 offense involved.

13 There's no allegations in this *Affidavit of Complaint*  
14 that the probation officer provided that indicates that the  
15 offense that Mr. McWhorter was charged with back in 1999 and  
16 plead guilty to in 2000 as a misdemeanor was for anything  
17 other than an insufficient funds check. The statute speaks  
18 to it being of insufficient funds.

19 The probation officer indicated that the inclusion of  
20 the language "with the purpose to defraud" or the mens rea in  
21 the *Affidavit of Complaint* might somehow make it something  
22 else. But certainly Missouri, like any other statute -- or  
23 any other state would have forgery statutes, would have  
24 identity theft type statutes, statutes of that nature that  
25 would take into account conduct other than insufficient

1 funds.

2 And the inclusion of a mens rea in an insufficient funds  
3 charge would just be a natural course of events. I think  
4 Tennessee's statute for insufficient funds includes a mens  
5 rea element.

6 So there's no evidence to suggest that there is anything  
7 about this case in 1999 that was anything other than an  
8 insufficient funds check case. And so to the extent that it  
9 is of the nature of the enumerated offense of insufficient  
10 funds, it was a sentence of probation for not more than one  
11 year.

12 And it was not similar to the instant offense, which  
13 involved the creation of this sophisticated conspiracy that  
14 Your Honor heard the trial on. And this is an offense that  
15 should not be counted. And that one point under Paragraph 49  
16 of the presentence report should be retracted.

17 And to that extent, Mr. McWhorter's criminal history  
18 category -- or criminal history points should be reduced by  
19 one point, taking away this bad check statute that was just a  
20 simple misdemeanor insufficient funds check and is not  
21 countable under the offense. And there is no evidence to the  
22 contrary that it was anything but that.

23 THE COURT: Okay. Now, was there one other  
24 objection to another point?

25 MR. FRENSLEY: Yes, there was, Your Honor. If

1       you'll let me go ahead and take that up now, I will.

2               That was, Your Honor -- I think I left my copy at the  
3       counsel table.

4               The objection was to the one point added for recency.  
5       That's at --

6               THE COURT: Because the offense was committed less  
7       than two years from being released from jail.

8               MR. FRENSLEY: Yes. That's it. I believe that's  
9       Page 20. 22, maybe. I'm not sure.

10              I apologize, Your Honor. That is the issue though, Your  
11       Honor. It's the recency point. The one point that's added  
12       for that particular reason.

13              I suppose this is really, technically, an argument for a  
14       variance, Your Honor. Because, again, speaking with the  
15       probation officer, the situation is this:

16              As the Court is probably aware, the United States  
17       Sentencing Commission has promulgated new guidelines to go  
18       into effect in November, absent some Congressional action.  
19       And in this particular situation with respect to the recency  
20       point, the Court has -- or sorry, the Commission has proposed  
21       two options regarding the calculation of those recency  
22       points.

23              The first option would eliminate the recency points for  
24       all offenders in all cases. The second option would be to  
25       eliminate the one additional point currently applied in cases

1       where the defendant also receives the two points for having  
2       been under a sentence of incarceration.

3               And it's Mr. McWhorter's position, Your Honor, that  
4       under either of those positions announced by the Commission,  
5       that it would be improper for the Court to apply the recency  
6       point in this particular case.

7               The Commission has held hearings. They have received  
8       public comment and testimony. They have gone through the  
9       entire process that they go through to make policy statements  
10      with respect to the guidelines, stating that it's their  
11      belief that this additional point under either of those  
12      options should not apply to people such as Mr. McWhorter.

13              And while I respectfully understand probation's position  
14      with respect to this, Mr. Hersch stating that until -- until  
15      it's in the book in November, then we don't count it. And I  
16      understand that, Your Honor.

17              But I think that this is an argument for a variance in  
18      this case, in light of the findings and determinations of the  
19      Sentencing Commission.

20              As I've noted, they have had extensive hearings,  
21      extensive investigation into this matter. They have  
22      concluded that recency points add nothing to the predicted  
23      quality of criminal history scores. And also, Your Honor,  
24      that the points fail to reliably reflect meaningful  
25      differences in past criminal behavior.

1           They essentially have argued or set forth as the policy  
2 of the Commission that these points or this point for recency  
3 should not apply.

4           And it's my argument that while it is true for purposes  
5 of determining the guidelines that the Court may, as  
6 Mr. Hersh suggests, need to make a finding that as of right  
7 now the point applies for purposes of calculating the  
8 criminal history, that consistent with the findings of the  
9 Sentencing Commission and its actions that the Court should  
10 grant a variance to reduce Mr. McWhorter's criminal history  
11 category by that one additional point.

12           And I would merely adopt and incorporate the Sentencing  
13 Commission's findings and reports with respect to its policy  
14 statements on this issue and submit that in light of that  
15 well-established authority from the Commission, that it would  
16 be appropriate for the Court to grant a variance with respect  
17 to that one point.

18           Now, the significance of these arguments in tandem here,  
19 Your Honor, is that if the Court concludes, as we suggest,  
20 that Mr. McWhorter should not receive the one point for the  
21 bad check case out of Missouri from 1999 on the basis that  
22 there's no evidence to suggest that this is anything other  
23 than an insufficient funds check and, therefore, should be  
24 excluded under the guidelines, and if the Court grants the  
25 variance as requested with respect to the recency point in

1 light of the Commission's recommendations and policy  
2 findings, that it would result in a two-level -- or a  
3 two-point decrease to Mr. McWhorter's criminal history score  
4 and, therefore, take him from a Category VI to a Category V.

5 And that would be the argument that we would advance.  
6 And we would respectfully request that the Court grant our  
7 arguments with respect to the one point for Paragraph 49 and  
8 the one point for the recency issue, in light of the  
9 Commission's action.

10 THE COURT: Okay. Let me hear from Mr. Howard on  
11 those two points, briefly.

12 MR. HOWARD: I'll turn first to the question about  
13 the Missouri conviction.

14 There are a couple of conditions, both of which need to  
15 be met for that point to drop out, as the defendant suggests  
16 it should.

17 First, it has to be one of the enumerated offenses in  
18 4A1.2(c). Specifically here, an insufficient funds check  
19 charge.

20 Mr. Frensley suggests that that's what this is. And I  
21 agree with him that based on the charging document from  
22 Missouri and the other material that the probation officer  
23 has assembled, it is not crystal clear. And that statute  
24 does include a situation where someone writes a check on  
25 their valid account, knowing that there's not sufficient

1 funds and it bounces.

2 That statute, however, also includes a subsection (1),  
3 which deals with what we traditionally think of as a bad  
4 check. One that is not on a valid account, but that is a  
5 fraudulent check; or one that was passed -- one that was  
6 passed knowing that it was not valid. So I think it's  
7 equally labeled for both.

8 Plus, in reviewing the *Affidavit of Complaint* in that  
9 case, it states in the Missouri case that this involved a  
10 check drawn on Farley State Bank, Parkerville, Missouri,  
11 dated November 21st, 1998, payable to K C Autoplex. Which  
12 suggests to me in the language of the charging document that  
13 this was not a personal check there simply was insufficient  
14 funds in. Rather, it was a payroll check or some other kind  
15 of business check. Which I would submit makes it more likely  
16 that this doesn't even -- we don't even get to the situation  
17 brought by 4A1.2(c).

18 However, even if the Court assumes or agrees with the  
19 defense that it does fall into that category, it still does  
20 not drop out. Because one of the conditions that needs to be  
21 met is that it does not involve a prior offense similar to  
22 the instant offense. So if it is similar to the instant  
23 offense, then it counts.

24 It's hard to imagine something more similar to this  
25 case, which involved the passing of counterfeit bad checks

1       again and again and again, day after day for eight months,  
2       than a charge involving a bad check passed to get money.

3               This whole case -- while, yes, it was dressed up with  
4       identification documents and the computer and the computer  
5       technique and the authentication features and all the rest,  
6       at bottom, all of that was a means to make the passing of a  
7       bad check more effective and more likely to get the money.  
8       That's exactly what this charge in the state of Missouri is  
9       about.

10              For that reason primarily I would argue that even if you  
11       assume that 4A1.2 is in play, I would argue that the prior  
12       offense is similar to this offense given that it involved a  
13       bad check. And therefore, the probation office correctly  
14       added the one point.

15              Very briefly on the second issue with respect to the  
16       proposed guidelines.

17              As the probation office noted, the guidelines are what  
18       the guidelines are today. Today, there's really no argument  
19       that the point was properly assessed.

20              I would also note that this crime occurred in  
21       November -- ended, at least, in November of 2006. It began  
22       in January, February, March of 2006. So we've had several  
23       iterations of the guidelines since then, all of which  
24       included this point.

25              That the Commission or that Congress may -- may approve



1 the proposed change is really of no moment in this  
2 proceeding.

3 Moreover, I think that the equitable arguments or  
4 variance arguments that were advanced also missed the mark.  
5 The Commission --

6 The wise and studied Commission that Mr. Frensley  
7 referred to may well have come up with a number of other  
8 changes that would increase the likelihood of sentencing  
9 exposure. And I'm confident that those wouldn't be argued  
10 with equal vigor.

11 So I think before the Court there's really no  
12 disagreement with what the guidelines hold with respect to  
13 this issue. And the Court should apply that point, as well  
14 as the points that relate to the Missouri conviction.

15 For those reasons, we would ask that the probation  
16 officer's view be upheld by the Court.

17 THE COURT: Thank you, Mr. Howard.

18 With regard to the criminal history points, specifically  
19 as relates to the defendant's objections, the first had to do  
20 with the Missouri conviction under Paragraph 49, which is  
21 titled in the report passing a bad check in Missouri,  
22 sentenced to one year of probation. He plead guilty to that.

23 I think Mr. Howard is correct, although I think  
24 Mr. Frensley has done a good job in suggesting that that was  
25 merely a misdemeanor. The sentence was not more than one

1 year, which is the amount required in 4A1.2(c)(1) for the  
2 application of the point.

3 But that provision also says or the prior offense was  
4 similar to an instant offense. And, of course, it is passing  
5 bad checks. And that is the gravamen of what this conspiracy  
6 was all about, was passing bad checks. So the Court believes  
7 that under that provision it should apply.

8 Secondly, with regard to whether one point should be  
9 added because the offense was committed less than two years  
10 from the defendant's release from prison. That's part of the  
11 guidelines now.

12 Mr. Frensley purports that it's suggested by the United  
13 States Sentencing Commission that it be changed. It's open  
14 for comment. It may, indeed, be changed, but there's no way  
15 I can predict that. Congress has to approve it, as well.  
16 And so it may be projected as a change, but it's not  
17 imminent.

18 And there is some history of the case, in that it was  
19 committed in '05 and '06. Actually, the conspiracy was in  
20 '06, from March to November of '06.

21 All the other defendants have been sentenced. All of  
22 them, to the extent that this offense was less than two years  
23 from them being released from jail, they were also subject to  
24 that additur to their criminal history point total.

25 Furthermore, having ruled on the objection of the

1 Missouri case -- that is, that that one point applies -- that  
2 would give the defendant 13 criminal history points, which  
3 would put him in Criminal History Category VI.

4 So the one point that we're addressing now, about  
5 whether it applies or is not applied because it's been  
6 suggested for change, for elimination, would not change his  
7 criminal history category from VI. Because with that point  
8 added, he has a criminal history of 14. So subtracting one  
9 point would still leave him in the same criminal history  
10 category.

11 I've ruled, I think, on all the objections. I'm going  
12 to let the lawyers consider that. We'll come back. I know  
13 there's argument by the defendant about the variance.

14 Both lawyers want to argue about what the proper  
15 sentence should be, what is the sentence that's sufficient  
16 but not greater than necessary in this case. I also want to  
17 hear from Mr. McWhorter.

18 I won't have time to do that before 1:00. I've got a  
19 meeting outside of the office for lunch, and I'm going to  
20 adjourn now. We'll come back at 2:00 and finish the  
21 sentencing procedure.

22 We'll stand in recess.

23 (Recess was taken at 12:40 p.m.)

24  
25 THE COURT: Be seated.

1           When we recessed for lunch, we had made it through all  
2 the defendant's objections except for restitution. The  
3 *Presentence Investigative Report* lists the restitution as  
4 \$128,383.55.

5           We've talked about the actual losses earlier. It  
6 appears that there was only one victim that responded to the  
7 presentence report writer's inquiry about the amount of their  
8 loss. So if that is true, I assume we're talking about  
9 Wal-Mart and any others that they have specific knowledge  
10 about.

11           What's the Government's position on restitution?

12           MR. HOWARD: Our position on restitution is that  
13 whatever actual loss figure the Court has determined -- I  
14 know we've gone back and forth somewhat -- that that figure  
15 is the same as restitution in this case.

16           Obviously, intended loss, whatever the amount of that  
17 the Court found, that's not part of it. But the figures  
18 listed on Exhibit A, or Exhibit 1, represent actual loss for  
19 those stores, including Wal-Mart. And we would ask that that  
20 be the restitution.

21           THE COURT: All right. Stay with me a moment.

22           On that first exhibit, Exhibit A, there was a total loss  
23 figured at \$96,143.40. That was initially. And then the  
24 Government has deleted some of these checks that were outside  
25 the date of conspiracy or otherwise they found were not

1 appropriate. The highlighted rows on Exhibit A. They  
2 eliminated those, which amounted to \$10,323.46, for a total  
3 of \$85,819.94.

4 The defendant says, I believe, that that deductible  
5 amount is \$12,047.02, rather than the \$10,323. That,  
6 obviously, would result in a different concluding figure.

7 Is that more or less where we are, do you think?

8 MR. HOWARD: That's right. And we're a little bit  
9 further --

10 The Government is not contesting the arithmetic issue  
11 before. So I think that the number for actual loss for  
12 Wal-Mart, as I have it, is \$84,096.38. \$84,096.38.

13 THE COURT: Okay. Thank you.

14 That's simply subtracting the \$12,047.02 from the  
15 original figure, I believe.

16 MR. HOWARD: Correct.

17 THE COURT: Okay. Let's hear from Mr. Frensley.  
18 He's got a frown on his face.

19 MR. FRENSLEY: Sorry. All right. It's more math,  
20 Judge.

21 THE COURT: You've been doing pretty well for a guy  
22 that didn't do much in math.

23 MR. FRENSLEY: I do my best, Judge.

24 THE COURT: I think we ought to make your figures  
25 more suspicious.

1           MR. FRENSLEY: Your Honor, I believe that the  
2 actual loss I think Your Honor has indicated with respect to  
3 the Wal-Mart issue that we have suggested is that \$84,000  
4 range.

5           The only other thing I guess I would point out -- and I  
6 don't know. Again, there's just not enough evidence, really,  
7 to make this determination. But do you recall with respect  
8 to Agent Stevenson, there was this conversation about the  
9 State of Tennessee. And it's my belief that perhaps those  
10 checks were payroll checks cashed at Wal-Mart, and they're  
11 reflected in the Wal-Mart amount.

12           So that would be the only other issue, I guess, I would  
13 take, would be with the \$7,168.68 in Exhibit A that's  
14 indicated for the State of Tennessee.

15           To the extent that Stewart's Pharmacy is the only one  
16 who provided any information back with respect to actual  
17 loss, I guess I don't really know whether these amounts were  
18 paid -- were recovered through some sort of insurance or  
19 anything like that.

20           There's also one other issue. That is I can't recall --  
21 it's not reflected in Mr. McWhorter's presentence report what  
22 sort of treatment the Court gave restitution with respect to  
23 the co-defendants, who all plead guilty to the conspiracy.

24           Perhaps Mr. Howard has a recollection. I was here for a  
25 couple of those sentences. I felt like my recollection was

1       that it was somewhere in the \$70,000 range of restitution for  
2       those folks.

3               MR. HOWARD: I can address that.

4               It's somewhat convoluted, but there were certain  
5       defendants for whom they were held responsible for the  
6       entirety of the conspiracy because they cashed one or two or  
7       three checks.

8               I think my predecessor's view, in conjunction with the  
9       probation office, was to try to make that equitable in terms  
10      of restitution. So even though those persons had a limited  
11      role, they would under the law have been liable for the  
12      entire amount of the conspiracy; which at that time it was  
13      determined for those defendants to be over \$300,000.

14              We did a pro rata amount of \$70,000 for certain  
15      defendants. That was not true, however, for all the  
16      co-defendants. At least Mr. Kennedy, and I believe --

17              At least Mr. Kennedy, and maybe Mr. Vincent -- I'm not  
18      sure. I know Mr. Kennedy, because he was involved during the  
19      entire time of the conspiracy. He was responsible for the  
20      entire amount of the restitution.

21              So our position would be there's no basis for this  
22      defendant to get a pro rata amount. He was obviously there  
23      at the very beginning, he was there at the very end. Like  
24      Mr. Kennedy, for example, who was the other defendant who was  
25      in from the beginning to the end.

1           MR. FRENSLEY: At a minimum, Your Honor, I would  
2 submit that the Wal-Mart loss should be reflected in the  
3 change in mathematical calculations and the additional  
4 \$1,800, which is around \$82,000 on Wal-Mart.

5           MR. HOWARD: I guess I should add, Your Honor,  
6 we're not disputing that whatever the amount is, it's joint  
7 and several with the other defendants and their amounts.

8           THE COURT: All right. For the amount of  
9 restitution, the Court will set the amount of \$82,296.11.

10          That figure represents the \$96,143.40 listed on  
11 Exhibit A as the amount of the loss by -- actual loss by  
12 Wal-Mart. It inserts the defendant's objections to some of  
13 those checks, as well as the Government's acknowledgment that  
14 some of those checks should be eliminated, the total of which  
15 was \$12,047.02. That reduces the actual loss to \$84,096.38.

16          Mr. Frensley pointed out some other over-representations  
17 by Wal-Mart in the calculations of the actual loss in the  
18 amount of \$1,800.27. So I've subtracted that from the  
19 \$84,096.38, for a total of \$82,296.11. And that restitution  
20 will be entered joint and severally.

21          MR. HOWARD: Your Honor, the number you just  
22 announced, does that refer to Wal-Mart alone or to the other  
23 victims that appear?

24          THE COURT: There were no other victims considered,  
25 unless you can point some out.



1           The presentence report indicated there were no other  
2 victims that answered the questionnaire about losses.

3           MR. HOWARD: Well, I don't dispute that some of  
4 these other victims may not have contacted the pretrial --  
5 I'm sorry, the probation officer formally. I don't think  
6 that's the test, however, under the mandatory restitution  
7 requirements under Section 3664.

8           We presented evidence in the form of testimony that the  
9 losses for these other stores were specifically tied to  
10 checks that had been actually recovered.

11          THE COURT: Is that the stores on Exhibit A --

12          MR. HOWARD: Correct.

13          THE COURT: -- listed after Wal-Mart?

14          MR. HOWARD: Yes.

15          THE COURT: Have you added up those?

16          MR. HOWARD: Well, I did add them up when I  
17 originally had the \$85,000 number. I haven't done it on the  
18 fly, with the Court's new revised figure.

19          THE COURT: Well, first, let me say, you're saying  
20 that these other stores listed in Exhibit A under Wal-Mart,  
21 beginning with Smithville Foods through Sam Ash Music on that  
22 page, that's an indication that they lost the amounts  
23 indicated across from their names?

24          MR. HOWARD: Right. That's the Government's  
25 position.

1           THE COURT: And you're saying further that those  
2 figures are not included in Wal-Mart's \$84,096.

3           MR. HOWARD: Correct. Wal-Mart is just one of  
4 several.

5           THE COURT: Okay. I think you're correct.  
6 Do you have any retort to that, Mr. Frensley?

7           MR. FRENSLEY: I liked Your Honor's first position  
8 there, that nobody else made any other indication.

9           THE COURT: Well, they may not. But the  
10 investigator says that they relied upon statements made by  
11 the local officials, as well as the stores in which these  
12 transactions took place. And they used that information and  
13 maybe other information, but they used that information to  
14 compile this list.

15           And they are very specific in terms of not only the name  
16 of the stores, that is the victims, their addresses, their  
17 phone numbers, and the contact person that related this  
18 information to them.

19           MR. FRENSLEY: But what we don't know, though,  
20 Judge --

21           I think my argument is that we don't know whether this  
22 represents actual loss to them or if they've otherwise  
23 recovered those funds, in the absence of them having any  
24 contact with probation in response.

25           If they otherwise recovered the funds and then were

1           ordered restitution on top, it would be a windfall to them.

2                   MR. HOWARD: But the restitution statute provides  
3           for that exact situation.

4                   THE COURT: It just says reported loss on the  
5           column.

6                   Do we need to call the investigator back and clarify  
7           that?

8                   MR. HOWARD: I don't know that anything needs to  
9           be --

10                  I'll be happy to clarify something, if the Court is  
11           asking me to do that. I'm not sure what the question is.

12                  THE COURT: Well, the question is Mr. Frensley said  
13           he wasn't sure whether that represented actual loss or  
14           whether it was an amount where the check had been cashed but  
15           somehow they had collected funds otherwise.

16                  MR. HOWARD: If they had collected funds from some  
17           other source?

18                  THE COURT: From some other source and it was not  
19           an actual loss.

20                  In other words, whether it was just checks cashed or  
21           attempted to be cashed, but they didn't suffer these losses  
22           in the amounts stated.

23                  MR. HOWARD: Could I have just a moment, Your  
24           Honor?

25                  THE COURT: You can ask him. And if he wants to

1       answer that question, we can bring him back.

2                       (Discussion held off the record.)

3               MR. HOWARD: I mean, like I say, it's a two-part  
4       answer.

5               I can safely state that we don't have -- the agent  
6       doesn't have any information regarding the individual  
7       insurance arrangements or whether these stores may have filed  
8       some civil small collections claim or those type of things.

9               So I don't think that we have any evidence to add to  
10      that point, but I don't think the restitution statute  
11      requires us to do that upfront.

12              Everyone agrees that no victim should get a windfall.  
13      There should be no double collection. So, for example, if  
14      Smithville Food Mart had an insurance carrier that paid out  
15      \$423 on one of these bad checks, no one is suggesting that  
16      Smithville Foods gets a double recovery.

17              By operation of the restitution statute, though, that  
18      can be factored in when the probation office actually does  
19      the collection, whenever that happens. There's a provision  
20      specifically in there that all it would do is it doesn't  
21      change the restitution amount, it just shifts to whom the  
22      restitution is owed.

23              So that \$423 would then not go to Smithville Food. It  
24      would go to ABC insurance carrier. This happens quite often  
25      in this type of case.

1           In the same sense as if there were a compensatory  
2 damages claim in a civil suit. That doesn't change the  
3 Court's obligation under 3664, my reading of it, to set what  
4 the total restitution is. The actual calculation is  
5 reflected where that restitution is actually paid, but it  
6 doesn't affect the Court's obligation to set restitution.

7           THE COURT: All right.

8           Mr. Stevenson, would you come back up here a minute and  
9 answer a question for me. If you've got that Exhibit A,  
10 which is the loss amount --

11          AGENT STEVENSON: Yes, sir.

12          THE COURT: Consider yourself still being under  
13 oath to tell truth.

14          AGENT STEVENSON: Yes, sir.

15          THE COURT: Do you have that list in front of you  
16 that begins on the far left side with the victim?

17          AGENT STEVENSON: Yes, sir.

18          THE COURT: The first victim is listed as Wal-Mart.  
19 Then there's a series of establishments -- pharmacies,  
20 markets, gas, so forth -- under that.

21          How did you arrive at the figures for the reported loss  
22 for all of those others under Wal-Mart?

23          AGENT STEVENSON: Other than Wal-Mart?

24          THE COURT: Yes.

25          AGENT STEVENSON: These figures were reported

1 directly from either the police reports or the individual  
2 stores.

3 For example, the first one, Smithville Foods. When the  
4 check or multiple checks would come in, they came in to be  
5 cashed, this particular store paid that amount of money out.

6 Now, whether they received anything in return from the  
7 bank or insurance or otherwise, I couldn't tell you.

8 THE COURT: But they paid this amount on a bogus  
9 check?

10 AGENT STEVENSON: Yes, sir.

11 THE COURT: Okay. Do you want to ask him anything,  
12 Mr. Frensley?

13 MR. FRENSLEY: No, Judge.

14 THE COURT: Do you want to ask him anything?

15 MR. HOWARD: No.

16 THE COURT: Okay. Thank you.

17 Okay. I'm going to add those amounts to the amount of  
18 restitution. It seems clear from the officer's clarification  
19 that these were additional losses as a result of this  
20 identity theft and fraudulent check conspiracy.

21 I don't have a computer with me, but I'm going to add  
22 all those numbers. I may have that done while we complete  
23 this ceremony.

24 So with that, Mr. Frensley, let's move to the part in  
25 your *Sentencing Memorandum* where you talk about a variance in

order to --

Well, there's two things. One is you say that there should be a variance for his cooperation with the state authorities.

MR. FRENSELY: That's correct.

THE COURT: And you mention some other things, too. But I think just to clarify where we are, we have a guideline range now, as adjusted by the Court down two levels, with an adjusted offense level of 26, Criminal History Category VI, with a recommended guideline range of 120 to --

Just a minute.

(Discussion held off the record.)

THE COURT: We have to select a sentence that's sufficient but not greater than necessary to meet all the sentencing factors in 3553(a).

MR. FRENSELY: Thank you, Your Honor. As Your Honor pointed out in the *Sentencing Memorandum* --

Your Honor, I'm not sure what -- in the world of ECF, I don't know if I need to make any sort of preliminary remarks with respect to the record on this matter.

Obviously, Your Honor has reviewed the memorandum I submitted. And there are some matters I'm going to touch upon. I guess I'll leave that to the Court's discretion. I'm not sure if I need to make any statement on the record with respect to sealing this portion or anything of that

1 nature.

2 THE COURT: You have attached to your *Sentencing*  
3 *Memorandum* a letter from a District Attorney --

4 MR. FRENSLEY: That's correct, Your Honor.

5 THE COURT: -- who relates some assistance that he  
6 received from Mr. McWhorter relating to another offense. And  
7 it's set forth there in that one-page letter.

8 The Government has also mentioned that. They have  
9 somewhat of a contrary view, perhaps. But you're relying on  
10 that, among other things --

11 MR. FRENSLEY: That's right, Your Honor.

12 THE COURT: -- to justify a variance in the  
13 recommended, but advisory only, guideline range for  
14 sentencing.

15 MR. FRENSLEY: That's correct, Your Honor.

16 Your Honor, with respect to this issue, the Court may  
17 recall that back a couple of years ago there was a murder  
18 over in East Nashville of a Vanderbilt professor and his  
19 sister who was visiting from out of the country. And  
20 subsequent to or shortly after that murder, some individuals  
21 were apprehended using credit cards and other identifying  
22 information from that particular professor.

23 That professor was someone who was, I believe, only one  
24 of maybe eight people in the world who could identify and  
25 read certain Aztec Indian language. He was someone who made



1 a very significant academic impact.

2 One of the individuals who was charged with those double  
3 murders was an individual named George Cody. And Mr. Cody is  
4 a member of the Vice Lords gang.

5 Mr. Cody was housed in the Criminal Justice Center. And  
6 during the time of his incarceration, Mr. McWhorter, as the  
7 Court has observed through the testimony of others, has a  
8 degree of intellect with respect to matters of criminal law  
9 and whatnot that just results in folks seeking him out for  
10 advice.

11 Mr. McWhorter was approached by Mr. Cody, wanting to  
12 know certain information about the charges he was facing,  
13 because Mr. Cody came to learn that Mr. McWhorter was charged  
14 with financial crimes.

15 And during the course of those conversations, Mr. Cody  
16 told Mr. McWhorter certain information about the charges he  
17 was facing in the murder investigation and made certain  
18 statements with respect to his involvement in that; admitting  
19 that he was there at the time that the two individuals were  
20 murdered, but stating that he did not pull the trigger, if  
21 you will.

22 He also told Mr. McWhorter certain matters that were  
23 outside the realm of the public domain. Things that related  
24 to the offense, but were not publicly reported, were not  
25 otherwise known to the public at large. So therefore --

1           Initially, Mr. McWhorter didn't think much of it.  
2           People talk a lot, and he didn't really know whether there  
3           was truth to the matter. He was subsequently able, through  
4           conversation with other individuals, to corroborate some of  
5           the information that Mr. Cody had told him about.

6           And thereafter, he wrote a letter on his own -- in fact,  
7           without my knowledge -- to the Metropolitan Police  
8           Department, indicating his knowledge about some matters  
9           related to that murder investigation. And he put in that  
10          letter some information that was not publicly known. Stating  
11          if this is true, you know, and you want to talk to me, I'm  
12          willing to talk.

13          Thereafter, I was contacted. Mr. McWhorter gave a  
14          proffer to Assistant District Attorney General Robert McGuire  
15          and another Assistant District Attorney who was involved in  
16          that murder case.

17          Mr. McWhorter, as set forth in the *Sentencing*  
18          *Memorandum*, provided the state with significant information.  
19          Most importantly, information regarding admissions made by  
20          Mr. Cody that placed him at the scene of the crime.

21          He also provided information that in the first instance  
22          was unknown to the Metropolitan Police Department. He  
23          provided information about a hiding place that was utilized  
24          to store one of the murder weapons.

25          The Metropolitan Police Department indicated that prior

1 to Mr. McWhorter's statements to them, they didn't even know  
2 anything about this, but that they subsequently corroborated  
3 the existence of this hiding place.

4 He likewise provided information that, again, the state  
5 was able to corroborate as having been never disseminated  
6 publicly and otherwise would not have been known to  
7 Mr. McWhorter, but for the statements of Mr. Cody.

8 Now, all of these things were significant, as  
9 Mr. McGuire sets forth in his letter. He states, In a case  
10 that was largely circumstantial, I believe that  
11 Mr. McWhorter's testimony positively impacted the jury and  
12 helped them reach the verdict that they ultimately came to.

13 The Court is well aware of the power of an admission in  
14 a case. But in this particular case I would submit it was  
15 even more powerful because Mr. Cody asserted a defense that  
16 he was involved with credit cards, he was involved with using  
17 the information that was taken from the home of the  
18 professor, but that he wasn't there and didn't participate in  
19 it.

20 So, essentially, he had a defense to the more serious  
21 offense of felony murder. His argument was basically that I  
22 otherwise obtained these credit cards and then used them, but  
23 I didn't have anything to do with the murder, nor was I even  
24 there.

25 So, again, that highlights, I would submit, the

1       significance of Mr. McWhorter's testimony. Because it not  
2       only provided the admission by Mr. Cody, but also gave  
3       corroborating information that the police were able, through  
4       subsequent testimony in that murder trial, to say, yes, all  
5       these facts that Mr. McWhorter testified to were not in the  
6       public domain, were not known to any individuals outside of  
7       the case, and the only way that Mr. McWhorter could have  
8       known them is for Mr. Cody to have told him.

9       So not only is the admission testimony itself  
10      significant, but, more importantly, the manner in which the  
11      state was able to independently corroborate Mr. McWhorter's  
12      testimony essentially defeated Mr. Cody's defense in that  
13      case and provided the linchpin for the convictions for the  
14      murders in that case.

15      And, as I said, these were cases that weren't by any  
16      means a slam dunk for the state. And as indicated by  
17      Mr. McGuire in his letter, the cases were largely  
18      circumstantial.

19      So this admission testimony, coupled with the matters  
20      that gave additional credibility to that testimony, made  
21      Mr. McWhorter's testimony extremely significant and useful in  
22      that proceeding.

23      Now, I understand in this case, Your Honor, that the  
24      Government has not filed a motion under 5K1.1 regarding  
25      substantial assistance. But I nonetheless submit that the

1 factors set forth in that guideline provision are essential  
2 and are instructive to the Court with respect to evaluating  
3 the cooperation that Mr. McWhorter gave in this double murder  
4 case.

5 I've spoken to the first one regarding the significance  
6 and usefulness of the defendant's consideration. And then  
7 likewise, Your Honor, with respect to the second factor  
8 addressing the truthfulness, completeness, and reliability.

9 That was established by the state being able to put an  
10 officer on the stand who could testify to corroborate the  
11 testimony that Mr. McWhorter gave, thereby establishing its  
12 truthfulness, completeness and reliability.

13 Likewise, Your Honor, with respect to the third element,  
14 the nature and extent of that assistance. Mr. McWhorter made  
15 the ultimate extent of his cooperation by testifying against  
16 Mr. Cody in that trial. Which I'll address, to an extent,  
17 with respect to the fourth factor, which is injury suffered  
18 or danger or risk of injury.

19 And in this particular case, again, as General McGuire  
20 points out in his letter, Mr. Cody is a member of the Vice  
21 Lords gang. The Vice Lords gang is a street gang. They're a  
22 violent gang. They're a gang that is predominant in the  
23 prisons here.

24 And Mr. McWhorter, in addition to taking on the risk of  
25 testifying against a known gang member that's inherent in

1       such action --

2               As Your Honor may imagine, because of the victims in  
3       that particular murder case, this was a trial that garnered a  
4       significant amount of attention. And Mr. McWhorter was front  
5       and center because, again, of the significance of his  
6       testimony.

7               It resulted in him being identified by name in news  
8       media outlets. Specifically, on television. A close-up  
9       picture of him on the witness stand was broadcast over the  
10      television, along with his name underneath him, for everyone  
11      to know.

12              So in addition to the inherent danger of testifying, as  
13      Mr. McGuire talks about, with respect to someone who is a  
14      gang member of this nature, also Mr. McWhorter had the added  
15      danger of risk associated with his being broadcast publicly  
16      and well known for his cooperation in that regard.

17              It's my understanding, Your Honor, from conversations  
18      with Mr. McGuire and others, that there are other individuals  
19      who had cooperated or attempted to cooperate in this case  
20      that suffered extreme injuries as a result of being stabbed  
21      in prison at the CJC here in Nashville.

22              So the risk was not inconsequential. It was, in fact,  
23      very significant. And I would submit it continues, in light  
24      of Mr. McWhorter's continued custody.

25              I appreciate, as an aside, the efforts that the

1 Marshal's Service here has taken to move Mr. McWhorter to  
2 another facility and do everything to protect him. But, Your  
3 Honor, I'm sure, from your own docket, is aware of the number  
4 of cases in this district regarding or involving the Vice  
5 Lords gang. So that risk is very significant.

6 Finally, with respect to the timeliness of that  
7 assistance. While it is true, as the Government points out,  
8 that Mr. McWhorter provided this information after he was  
9 facing indictment in this case, it nonetheless doesn't  
10 diminish the significance of that cooperation.

11 Nor does it diminish the fact that the timing within  
12 which Mr. McWhorter cooperated enabled the state to use him  
13 as a witness, and his information, in order to secure two  
14 felony murder convictions against Mr. Cody in a case that was  
15 largely circumstantial and which Mr. Cody had, prior to the  
16 testimony of Mr. McWhorter at least, a defense to those more  
17 serious charges.

18 So with respect to the considerations in 5K1.1 with  
19 respect to the variance argument, Your Honor, I would submit  
20 that Mr. McWhorter's cooperation in this case is extremely  
21 significant and extremely warranting of this Court taking it  
22 into consideration and departing from the guideline sentence  
23 that has previously been announced of 120 to 150 months.

24 With respect to guidance for the appropriateness or the  
25 appropriate level of the departure, I would submit that Your

1 Honor can utilize the departures previously given to  
2 co-defendants in this case and, obviously, the Court's prior  
3 experience with departures, for some basis for what an  
4 appropriate departure would be.

5 In this case, as the Court is aware, the Government  
6 filed motions under 5K1.1 with respect to Chad Vincent and  
7 Anthony Kennedy.

8 In those cases, Your Honor may recall that those  
9 individuals were allowed to plead, in the first instance, to  
10 counts that carried significantly less time than the other  
11 counts to which they may have been subject to liability,  
12 which resulted in a reduction in and of itself. And then on  
13 top of that, the Court awarded additional departures of 40%  
14 and 30% for those defendants in this case.

15 And I would submit that when weighing the nature of the  
16 cooperation given by Mr. Vincent and Mr. Kennedy against  
17 Mr. McWhorter, compared to the cooperation given by  
18 Mr. McWhorter in the murder case involving George Cody, that  
19 Mr. McWhorter is entitled to at least as much benefit or  
20 consideration as those defendants received.

21 And I would respectfully submit that he is entitled to  
22 greater benefit for the following reasons:

23 First of all, the testimony that Mr. Vincent and  
24 Mr. Kennedy gave in this case, I would submit, was largely  
25 cumulative.



1           As the Court recalls, there were statements that  
2           Mr. McWhorter gave that were played for the jury. There was  
3           significant physical evidence that was presented to the jury.  
4           And everything --

5           With the exception of the testimony related to the  
6           William Blake ID in Count 5, which is a two-year sentence,  
7           the testimony given by those individuals was largely  
8           cumulative.

9           Compare that to the testimony that Mr. McWhorter gave in  
10          the Cody matter, where it was admission testimony. And it  
11          was testimony that directly related to the defense that  
12          Mr. Cody would assert in that case, and was such that  
13          resulted in convictions for two felony murders compared to  
14          financial crimes.

15          And, again, it's not to diminish this case. But  
16          certainly when we hold those two up, when you think of  
17          cooperation in this case compared to cooperation in a double  
18          murder case, it would seem to me that there's not much  
19          comparison, aside from the fact that everybody has  
20          cooperated.

21          Secondly, and equally important I would submit, is the  
22          factor with respect to the danger or risk of injury to the  
23          defendant in the matter of Mr. Vincent and Mr. Kennedy as  
24          compared to Mr. McWhorter.

25          Mr. Kennedy's and Mr. Vincent's testimony may subject

1       them to some sort of generalized risk associated with dislike  
2       or disfavor with individuals providing any information to the  
3       Government. However, that's nowhere near the level of risk  
4       associated with the testimony that Mr. McWhorter gave against  
5       a known gang member, against a gang -- involving a gang that  
6       has a history of violence and is predominant within the  
7       prison system; exposing Mr. McWhorter to extreme risk not  
8       only from the individual against whom he gave the testimony,  
9       but against all individuals affiliated with that individual  
10      as a result of the gang affiliation.

11       So when measuring the value and weight to be attributed  
12      to the cooperation, I would submit that in this case, given  
13      the nature of Mr. McWhorter's cooperation and given the risks  
14      associated with that cooperation, that a reduction of 50%  
15      compared to the 30% to 40% for Kennedy and Vincent would be  
16      appropriate in this case, for all those facts and for all of  
17      those reasons.

18       And therefore, I would request that Your Honor grant a  
19      variance in this case based on his cooperation and  
20      assistance, considering the factors under 5K1.1, and reduce  
21      Mr. McWhorter's sentence by 50% from whatever within the  
22      guideline range. And I would ask that that be the bottom of  
23      the guideline range, 120 months. Understanding, of course,  
24      Your Honor, that we still have the 24-month consecutive  
25      sentence for Count 5 that goes on top of this.

1           And with that reduction and with that additional  
2 sentence, it would still recognize the seriousness of the  
3 instant offense. It would still result in a greater sentence  
4 for Mr. McWhorter than any of the other co-defendants in this  
5 case. But it would nonetheless recognize the importance and  
6 the value of that assistance that Mr. McWhorter gave and the  
7 danger he faces associated with that cooperation, resulting  
8 in a double murder conviction for an individual.

9           Would Your Honor like me to address any other factors at  
10 this time? Or do you want to take these sort of in turn?

11           The only other thing I really wanted to draw the Court's  
12 attention to is certainly there are personal factors set  
13 forth in our memorandum regarding Mr. McWhorter's upbringing.  
14 And then also the disparity issue between the defendants in  
15 this case, in light of the sentences that were handed out to  
16 other individuals.

17           THE COURT: Okay.

18           MR. FRENSLEY: Thank you.

19           THE COURT: Mr. Howard, what do you say about that  
20 substantial assistance and request for a variance?

21           MR. HOWARD: Your Honor, I don't dispute the  
22 statements in Mr. McGuire's letter that Mr. Frensley attached  
23 to his memorandum. That is the entirety of the evidence that  
24 Your Honor has before you regarding the assistance that this  
25 defendant provided in an unrelated state case.

1           No one is suggesting that cooperating in a murder case  
2           is not a good thing to do. As we pointed out in our paper,  
3           though, I think it needs to be viewed in context here for the  
4           separate question of what benefit should the defendant get in  
5           this case for the sentence.

6           The distinction between whether it's a good thing to do,  
7           which it undisputedly is. But the separate question is what  
8           the benefit should be in this case.

9           The two points that I would just amplify here that we  
10          mentioned in our papers are first, the defendant didn't do  
11          anything, at least initially, to get this. He didn't  
12          cooperate. He didn't approach law enforcement.

13          He had a piece of information fall into his lap  
14          fortuitously, and he parlayed it to his advantage. I'm not  
15          disputing that's not a good thing in this case, given the  
16          help that it provided the state. But it is qualitatively  
17          different than someone who elects to do something affirmative  
18          in the first instance.

19          Secondly, I ask you to view it in context with the  
20          timing and the overall proceedings that have occurred in this  
21          case. The defendant's cooperation only occurred when he knew  
22          he was facing --

23          He had already been convicted and he knew he was going  
24          to be facing a lengthy federal sentence. That's different  
25          from a defendant who sometimes even before they're arrested,

1 but shortly after they're arrested, gives up their right to a  
2 defense, right to self incrimination, and so forth.

3 For those two reasons, I think the Court has to keep  
4 what the defendant did in context. Not denying it's a good  
5 thing, that he cooperated, and it had a good result. But  
6 keeping in context what real benefit he deserves in this  
7 case, which is different than the case he cooperated in.

8 THE COURT: Thank you.

9 Mr. Frensley, does Mr. McWhorter wish to address the  
10 Court?

11 MR. FRENSLEY: Yes, Your Honor.

12 THE COURT: All right.

13 MR. FRENSLEY: Would you like us to come around?

14 THE COURT: And you said you wanted to make a few  
15 other comments about the proper sentence in this case or  
16 other factors. You can make those after Mr. McWhorter makes  
17 his comments, or if you would rather make them before.

18 MR. FRENSLEY: If I may. Maybe I'll just make them  
19 before.

20 Your Honor, may it please the Court. Obviously, one of  
21 the hardest things a judge has to do is impose sentence on  
22 individuals who stand in front of them. You've seen the  
23 good, the bad, and the ugly. Often more the bad and the ugly  
24 than the good.

25 In this case, Your Honor, I would submit that based upon

1 the factors of 3553(a), most importantly based upon  
2 Mr. McWhorter's post offense conduct in recent times with  
3 respect to this cooperation in state court, that  
4 Mr. McWhorter is not unredeemable.

5 This is an individual who possesses extreme capabilities  
6 of intellect and ingenuity. And if channeled in the proper  
7 direction, I submit can be extremely productive in society  
8 and can do very good things if he will direct it in the  
9 appropriate way.

10 The presentence report includes a significant amount of  
11 detail regarding the difficult life that Mr. McWhorter had.  
12 He's had no recent contact with his family members.

13 His father left home, I believe, at the age -- when he  
14 was nine years old. He had no significant contact with him  
15 thereafter.

16 Mr. McWhorter had a rough home life, to put it mildly,  
17 culminating in problems with abuse relating to his mother,  
18 criminal activities surrounding his family. And his only  
19 sibling, a brother, is facing a lengthy sentence of  
20 incarceration in the Department of Correction even now.

21 In other words, Mr. McWhorter had a difficult time.  
22 That was compounded by psychological issues that are also  
23 reflected, with respect to depression, suicide attempts; and  
24 at least during the course of the allegations in this  
25 complaint, involved extensive drug use.

1           However, Mr. McWhorter has hope because he has two  
2 children out there. And he knows that he can find a better  
3 way and that he can do better.

4           And I would submit that the great personal risk that he  
5 undertook to cooperate with the state authorities in the Cody  
6 case and that double murder are reflective of an individual  
7 who sees an opportunity to do something better.

8           And I would ask that Your Honor take those factors into  
9 account, consider those matters, and consider his ability of  
10 redemption and rehabilitation when imposing sentence.

11          I would respectfully submit, for the reasons set forth  
12 earlier, a sentence at the low end of the 120 month range,  
13 further reduced as a result of his cooperation.

14          And, again, not to take too much issue with Mr. Howard's  
15 position, but the fortunate thing here is that all  
16 individuals who cooperate aren't doing it just out of the  
17 goodness of their heart. And that's why the guidelines set  
18 forth factors to consider.

19          And I've taken the Court through each of those factors  
20 and why they apply in this case. And I would submit that in  
21 light of those factors, the appropriate sentence would be one  
22 of 60 months, followed by the 24 month mandatory sentence for  
23 Count 5 in this case.

24          And Mr. Howard reminded me earlier, Your Honor, that  
25 there's one more housekeeping matter, I believe, with respect

1 to reviewing the presentence report. Confirming with  
2 Mr. McWhorter that we have, in fact, reviewed the presentence  
3 report, and its amendments as well.

4 THE COURT: Okay. Have you reviewed the most  
5 recent revision of the presentence report, Mr. McWhorter?

6 THE DEFENDANT: Yes, Your Honor.

7 THE COURT: Okay. That's the one that was revised  
8 on June the -- what did it say? 10th? June 10th, 2010?

9 THE DEFENDANT: That's right.

10 THE COURT: Okay. I'll be happy to hear from you  
11 now.

12 THE DEFENDANT: Your Honor, first, I want to point  
13 out that the videotape the night that I got arrested -- I  
14 mean, it was flat out. I'm glad that you recognize that  
15 there was a bragging aspect of it.

16 It's one of those things that at the time, I wanted them  
17 to focus on me. I didn't want them to focus on my wife. And  
18 the bragging part of it kind of --

19 You know, it's a boastful thing that if you focus on me,  
20 if you think that you have the right person, that you're not  
21 going to pay attention to her.

22 I mean, throughout the case I know that the --  
23 especially the relationship I had with her is greatly  
24 diminished as a result of this case. You know, we filed for  
25 divorce. She says that she don't want a divorce, but I can't



1 be around her. The drug use.

2 I'm not diminishing the fact of how I got on drugs. I'm  
3 a grown man. If I didn't want her to get me on drugs,  
4 there's no way it would have happened. That choice was mine.  
5 But, I mean, she was a significant influencing factor in  
6 that.

7 And, I mean, I just -- I can't be around her and that.  
8 I mean, there's just no way. She's -- you know, it's one of  
9 those things that, like, she's gotten smarter with it. Now,  
10 all of her drugs are prescribed. But, you know, when you get  
11 down to it, she's still a drug addict. And if I'm around  
12 that, I know what's going to happen to me. I'm going to get  
13 back in trouble. It's going to get in that where you need  
14 money.

15 And, I mean, I can't diminish the fact that I do have an  
16 ability to get money illegally. I know that. And I'm not --  
17 it's wrong. I mean, I have no doubt about that. And I wish  
18 that there was --

19 I know that no matter what I say, it's just words.  
20 Which is one of the reasons why, you know, as Mr. Frensley  
21 pointed out, is why I actually did cooperate with Mr. Cody,  
22 to show an action.

23 As he was talking about, the gentleman who got injured,  
24 he was in the same cell with me. He got 435 stitches over  
25 that. There was different members other than Mr. Cody who

1       went after him. As soon as they found out that he was  
2       cooperating, they went after him. 435 stitches. I think  
3       two-hundred-something of them were in his face alone.

4               And I knew that when I contacted Metro. I knew that  
5       that had happened. I knew why that had happened. But I knew  
6       that if I came up here and I just gave you words, you're  
7       not --

8               I mean, I knew that there's no way, that no matter what  
9       I say, you would buy that. Which is the main reason why I --  
10      I mean, it's one of the motivating factors of why I did what  
11      I did do.

12              I know there's a case up here involving the Vice Lords,  
13      where the whole -- I think there's five or six murders  
14      attached to it. Where the beginning of it was another gang  
15      member told something to another gang member, that they  
16      considered snitching, that reflected on his credibility -- or  
17      not his credibility, but on his reputation. And they  
18      killed -- I mean, there's probably eight or nine people that  
19      got killed over a discrepancy in somebody's reputation.

20              I mean, at a minimum, the guy is going to get 104 years  
21      in prison. At a minimum. And, I mean, I know that they'll  
22      come after me.

23              If I remain committing crimes, if I'm around that  
24      aspect, if I'm around those type of people, I know what will  
25      happen. And by doing what I did, it makes it --

1 I mean, it's not only an act to try and show you that I  
2 do want to change, but it's another motivating factor to me  
3 that I can't -- I mean, I just, I can't, I can't go back to  
4 committing crimes.

5 I'm not even going to stay in Tennessee. I can't. And  
6 I know that. And regardless of what type of departure,  
7 whatever I get, the main -- one of the main reasons I did it  
8 for myself was to get me out of that. Because if I stay  
9 here, I'll be right back in trouble.

10 Mr. Kennedy in the case, he actively writes me. He  
11 wants me to do this again. He wants me to get out and help  
12 him do this again. And I don't want to.

13 I am so sick of this. I'm so sick of jail. I'm so sick  
14 of courts. I'm just --

15 THE COURT: Well, that's a good thing that you're  
16 sick of me and the courts, all these. You don't want to see  
17 me anymore. I can understand that. And I hope you don't.

18 THE DEFENDANT: What I want --

19 I know -- I know I've still got to go to prison. I know  
20 that. I don't want to get let go, because I don't need that.  
21 If I get let go, I'll get back in trouble again. I know  
22 that.

23 What I want is there's -- I want to learn a new trade.  
24 I mean, that's first and foremost. The biggest thing that  
25 gets me in trouble is the skills that I do have, nobody wants

1       them because I'm a felon.

2               I can draw pictures like black and white photos. I mean  
3 I'm -- I mean, perfect. But anything like that deals with  
4 trademarks or deals with copyrights. And they don't want  
5 convicted felons around that. I mean, I've applied. I've  
6 tried. They just don't want it. The computer knowledge they  
7 don't want. They won't accept the fact --

8               I mean, I'm a seven-time convicted felon. They don't  
9 want that.

10              THE COURT: Well, I'll tell you, you've got a  
11 hurdle to overcome, being a convicted felon. But you were a  
12 convicted felon before you came here.

13              THE DEFENDANT: No. No. I know. There's no doubt  
14 about that.

15              THE COURT: So you use that as an excuse, I guess,  
16 to go back to crime.

17              THE DEFENDANT: No.

18              THE COURT: Now, you're smarter than that.

19              There are convicted felons that get jobs. They have to  
20 prove themselves. And it's tough to get that job. You may  
21 have to prove yourself at a job that you really are not crazy  
22 about doing, but you do that for a while and you begin to  
23 build trustworthiness and reliability. And it's one step at  
24 a time.

25              I'll admit that you've dug yourself a hole, but you're

1 the only one who can get out of it.

2 THE DEFENDANT: I know, Your Honor.

3 THE COURT: I would say your first problem, though,  
4 is making sure you get rid of this -- you're in recovery from  
5 drugs.

6 THE DEFENDANT: Absolutely.

7 THE COURT: Because you'll be tempted.

8 THE DEFENDANT: I've rejected it in jails. You  
9 know, a lot of people think that when you're in jail, you  
10 can't do drugs. And that's not true.

11 THE COURT: Oh, I know that.

12 THE DEFENDANT: Yeah. There's plenty of it. And  
13 I've turned it down every time. I've been offered it  
14 numerous times. I turn it down every time.

15 I go to AA and NA meetings. Well, I did when I was in  
16 Nashville. At Grayson County they offer it, but only to the  
17 county inmates, not to the federal inmates.

18 I want further treatment. I want that. I hated -- I  
19 mean, I hated being on drugs. That was --

20 I never even seen cocaine until I was 26 years old. I  
21 never laid eyes on it. The first night that I saw it, I  
22 shot. And, I mean, to go from -- I smoked a joint when I was  
23 14 or 15 years old. To go from that, to shooting drugs  
24 instantly.

25 I mean, the change. That affected me mentally,

1 physically, everything. That completely altered everything  
2 about me.

3 You know, again, I can't use anybody else as an excuse.  
4 I made those choices, to put myself in that position and to  
5 try it and to get addicted to it and go on from there. And  
6 that's what fueled a lot of the criminal acts involved in  
7 this. And it just --

8 I want the treatment. I want to get away from  
9 Tennessee. I want to get a new trade. And at Grayson  
10 County, they have a book that shows all different  
11 apprenticeship programs, vocational programs within the BOP.

12 They have an electrical program, an apprenticeship  
13 program. I've heard that it's a two-year program. And then  
14 after that, you're able to take the journeyman license test.

15 That's a very good-paying job. I've never seen a  
16 construction job or electrical job, anything involving that,  
17 where they care whether you're a criminal or not. It's not  
18 the aspect of whether or not you've been convicted before,  
19 it's just whether or not you can do the work. And, you know,  
20 that's at least 24 months to do that.

21 I would like to get, you know, a degree. I think  
22 Mr. Frensley is going to ask you, and I'm going to ask for it  
23 as well, to be recommended to FCI Tucson. It has all the  
24 programs that I want. It has the -- it offers an associate's  
25 degree program. It has the apprenticeship program with the

1       electrical. They've got the drug program there. It's a  
2       40-hour one. They don't have the 500-hour one there. They  
3       have the 40 hour. They have AA, NA. They offer everything  
4       that I want.

5               With the sentence that Mr. Frensley is recommending of  
6       84 months, if you take off the time that I've already served,  
7       that will give me enough -- ample time, actually, to complete  
8       the two-year course, complete the drug program that I need to  
9       continue my recovery process on that. And after that, I'm  
10      able to get out and able put that to use and try to further  
11      myself.

12             I want to continue going to school after I get out for  
13      auto engineering; which is one of the reasons why I want to  
14      take the electrical, because they kind of go hand in hand  
15      with each other.

16             But, I mean, those jobs pay really good. And it's one  
17      of those things whether or not you can do the job, not your  
18      past or what all you've done. It's just can you -- are you  
19      capable of doing this?

20             And I mean, I just -- I've tried to do what I can  
21      action-wise to show you that I do want to change. And I  
22      just -- I ask the Court to take that into consideration.

23             And the sentence that Mr. Frensley is proposing, I think  
24      it fits everything. It's double the sentence that the other  
25      co-defendants received. And it --

1           I mean, personally, I think it fits to where I can do my  
2 programs and still be able to get out when my kids are still  
3 under 18, and be able to become productive. And so that way  
4 I don't have to keep coming back through this stuff.

5           THE COURT: Thank you.

6           MR. FRENSLEY: Thank you, Your Honor.

7           THE COURT: Mr. Howard.

8           MR. HOWARD: I think when the Court sets an actual  
9 sentence, it should focus on three things.

10          First, I'll address this prominently, the defendant's  
11 leadership of this criminal enterprise.

12          It is beyond dispute, in my view, that but for the  
13 defendant, this crime wouldn't have occurred. None of the  
14 other eight co-conspirators could have remotely -- could have  
15 remotely pulled this off or had the skills to do it, even if  
16 they wanted to. I don't think there could be any serious  
17 dispute about that.

18          This defendant was the leader. This defendant was the  
19 one that made it work and made it work for as long as it did.  
20 And, quite frankly, it probably would have lasted a lot  
21 longer if it weren't for the effects of the drug addiction  
22 that he and some of the others were experiencing.

23          He was the leader, the intellectual and creative force  
24 behind that. That puts him into a different class than any  
25 of the other co-defendants.



1           This is now the ninth sentencing in this case that I've  
2           appeared before the Court on. And I reflected back on some  
3           of those other ones and the co-defendants that came before  
4           him.

5           There's been a lot of talk about Mr. Kennedy and  
6           Mr. Vincent; which, you know, by any account, are not  
7           terribly savory characters. But I also recall some of the  
8           lesser members of the conspiracy that were drawn in and were  
9           recruited and used by the defendant.

10          People like his wife, Beatrice. And Chastity Leonard.  
11          And Dave Mayo. And Roger Rapp. Some of these people that  
12          suffered from severe mental limitations and drug addiction  
13          and a whole host of other issues. But these were the type of  
14          people that this defendant, I think it's fair to say, was  
15          preying on.

16          They weren't making a lot of money. They were the ones  
17          out on the front lines, cashing these checks. And the  
18          defendant was the one that was making money off those, shall  
19          we say, marginal people. People that had more problems, far  
20          more problems, than the defendant.

21          It was his leadership of that group that make this  
22          possible. He affected not only the victims in this case, but  
23          these other co-defendants.

24          So I think his leadership and the skill and intellect is  
25          the first point the Court should consider.

1           Secondly, as in any case, financial or otherwise, the  
2 effect on the victims is important. It's a \$200,000,  
3 \$300,000, \$400,000 case, depending on how you view the  
4 numbers. But that's really not the issue, in my view.

5           This is a deception. This is a deception-laden case.  
6 There were small stores out in the country, in places like  
7 Sparta and McMinnville, where losing three or four, five  
8 checks in a month makes a big difference.

9           We heard testimony from some of those people at the  
10 trial. The gentleman from Kingwood Foods, the gentlemen from  
11 some of the other markets that came here to testify. It had  
12 a significant effect on them.

13           And those places were targeted because, as the Court  
14 pointed out, they had less security. They were less thorough  
15 in their procedures. The effect on the victims is  
16 significant.

17           Last, I suggest to the Court that you should recall the  
18 defendant's utter and complete lack of remorse in this case.  
19 He's upset today. I understand that. Everyone is upset the  
20 day they get sentenced. But it's not just the videotape that  
21 we referred to so much and the Court has seen so much of,  
22 with the arrogant boasting and the taunting of the police  
23 officers and the braggadocio. It was a thread that ran  
24 through everything in this case.

25           We heard testimony at trial from Ronnie Hampton, where

1       he asked -- Ronnie Hampton, a guy who has been in prison most  
2       of his life, has no skills. He asked the defendant, Why  
3       aren't you out with a real job? You're so smart, why aren't  
4       you out with a real job?

5               And what was his response? I don't want to do that. I  
6       don't want to do that. Words to that effect. I want the  
7       easy money that I can get this way. That was who -- that was  
8       the person in this case.

9               Now, there's been suggestion that the drug abuse turned  
10      the defendant into something very different in this case.  
11      And we can certainly all appreciate the ravages of drug  
12      addiction. But if you take a look at the presentence report,  
13      it's thirty-some pages long of criminal history.

14              The defendant is a lifelong -- as an adult, he's a  
15      lifelong criminal. And they're all the same. It's all  
16      deception. It's all fraud. He wasn't on drugs when that was  
17      happening.

18              Even the conviction we were talking about today, the  
19      1999 Missouri conviction. You know, that's 11 years ago.  
20      It's a consistent, consistent pattern, that culminated in  
21      this case, which is of significance for this type of  
22      counterfeit check cashing ring. So I ask the Court to bear  
23      that in mind.

24              I think when you focus on the defendant's leadership and  
25      skill, the effect on the victims, and his complete and utter

1       lack of remorse, that a guideline range sentence in the upper  
2       half of the guideline range is appropriate in this case. And  
3       that's what the Government is requesting.

4               And the last question that I think, in my mind, is  
5       significant in this case, that I would ask the Court to  
6       ponder when you try to fix that number, is based on  
7       everything we've seen in this case -- at the trial, the  
8       suppression hearings, the videotape, the presentence  
9       report -- one question that I think is worth asking is: But  
10      for this case, is there any question in any reasonable  
11      person's mind that this defendant would be out committing the  
12      same crimes, the same way, again and again and again?

13             I would suggest that the answer to that question is no.  
14      The defendant is undeterred and he'll be undeterred in the  
15      future. The Court should sentence him in an appropriate  
16      fashion.

17             MR. FRENSLEY: Your Honor, may I raise one other  
18      matter?

19             THE COURT: All right.

20             MR. FRENSLEY: That is as it relates to  
21      Mr. McWhorter's jail credit, Your Honor.

22             THE COURT: What page?

23             MR. FRENSLEY: Page 2 of the presentence report.

24             I understand that in large part, matters of jail credit  
25      are issues for the Bureau of Prisons. But I just wanted to

1 point out to the Court that in this matter, Mr. McWhorter was  
2 arrested on November the 8th, 2006, and stayed in state  
3 custody until November the 17th, 2006, at which time he was  
4 transferred to the Department of Corrections.

5 And then the next point is the relevant date for this  
6 matter. He was transferred to federal custody on a writ from  
7 the Department of Corrections on October the 12th, 2007.

8 Just for the Court's information, I'm not sure how the  
9 Bureau treats that matter. But I wanted to bring it to the  
10 Court's attention that it's our belief that from the point of  
11 October 12th, 2007, Mr. McWhorter has been in federal custody  
12 on this matter.

13 It appears that perhaps the state may have run that time  
14 concurrent, counted it against that, but I would ask that  
15 Your Honor take that into account and perhaps make some  
16 findings with respect to that for the benefit of the Bureau,  
17 if Your Honor agrees with our position that as of October  
18 the 12th, 2007 he was in federal custody on these charges,  
19 under indictment in this case, and moving forward in this  
20 case.

21 THE COURT: So what exactly are you asking me,  
22 Mr. Frensley?

23 MR. FRENSLEY: Well, Your Honor, I would like for  
24 the time from October the 12th, 2007 to count toward  
25 Mr. McWhorter's sentence in this matter, given that as of

1       that date he was in federal custody and in federal custody in  
2       relation to these particular charges.

3               THE COURT:   So you're saying he should be given  
4       credit for all time from October 12th, 2007?

5               MR. FRENSLEY:   Yes, Your Honor.   Even though his  
6       arrest was in November of the previous year, he stayed in  
7       state custody.   But then it appears he was writed out.

8               So it's my understanding that Tennessee was counting  
9       that time.   But for purposes of his federal sentence, Your  
10      Honor, I just ask that Your Honor make a finding that his  
11      custody -- he should receive credit against his federal  
12      sentence for that time period, since that's the relevant date  
13      at which he was brought into federal custody on these  
14      matters.

15              THE COURT:   Okay.

16              MR. FRENSLEY:   Thank you, Judge.   I apologize for  
17      not bringing that up sooner.

18              THE COURT:   As I have mentioned, the Court's  
19      responsibility is to select a sentence sufficient but not  
20      greater than necessary when considering all the relevant  
21      sentencing factors found at 3553(a).

22              The Court has previously found that the advisory  
23      guideline range is from 120 to 150 months.

24              The first sentencing factor to be considered is the  
25      nature and circumstances of the offense.   We've commented

1       about that. It's a conspiracy offense that lasted some eight  
2       months, hundreds of counterfeit payroll checks, hundreds of  
3       Tennessee driver's licenses that were falsely produced with  
4       sophisticated means. And there were hundreds of victims, as  
5       set forth in the Government's exhibits.

6       It's been difficult to compute not only the actual  
7       amount of loss, but the intended loss. We spent lots of time  
8       trying to determine that. A lot of it is because of the  
9       number of people involved cashing checks with fictitious IDs,  
10      using fictitious Social Security numbers and so forth.

11      Wal-Mart, who is an extremely large corporation, lost a  
12      great deal of money. It's not entirely satisfactory just to  
13      say well, they can afford it; which indeed they can, but  
14      they're entitled to protection under the law just as is the  
15      local independent businessmen and women.

16      And, as we have also noticed, there were many of those  
17      who lost money. They don't have the same system set up to  
18      monitor all their losses and record the various attempts to  
19      cash checks. But it was a sophisticated procedure that  
20      fooled a lot of people. And as a result of that, they lost a  
21      lot of money.

22      But the offense is also serious in that identity theft  
23      is a growing plague in this country. And I say that because  
24      it is ruining businesses and lives and costing the country  
25      and many individuals and companies lots of money.

1           And because identity theft in some cases is so easy for  
2 people who have a criminal mind, more and more people are  
3 entrapped and more and more money is being spent to try to  
4 deter this crime.

5           The sentence is also to reflect the history and  
6 characteristics of the defendant. Mr. Howard said that  
7 Mr. McWhorter had been a criminal all his life. That may  
8 stretch it a little bit, but his criminal activity did begin  
9 at a very young age. I think he was 20 when he cashed his  
10 first bad check. And he continued at those early ages, at 21  
11 and 22. So he started off on the wrong track.

12           He did have a troubled childhood. He had some early  
13 psychiatric issues as a result of his home life. He was  
14 raised primarily by his mother. His parents divorced when he  
15 was three, and he's had very little contact with his father  
16 since then.

17           But he and his mother didn't get along. They fussed and  
18 literally fought. A domestic assault warrant was taken out  
19 by his mother against him. He stole his mother's car and  
20 debit card when he was a teenager. They also had fights.

21           His older brother is incarcerated. And when he was 17,  
22 he had some psychiatric problems and was admitted to the  
23 Tennessee Mental Health Institute for observation and  
24 treatment.

25           Some of that might be attributable to the fact that he



1 dropped out of school. He started using marijuana when he  
2 was 14; and later on, as he testified, he began to use  
3 cocaine. He also used heroin, Dilaudid, morphine, ecstasy.  
4 And he's mentioned the effects of that on him mentally and  
5 physically. And drug addiction is a mental disease that does  
6 affect your brain, as he is smart enough to figure out.

7 He was married in 1998. He was divorced. He has two  
8 children. He says he wants to get out of prison so he can  
9 help to reestablish his relationship with them. One is 11  
10 and one is 10. Both girls. They now live with his wife's  
11 grandparents.

12 The presentence report says he's \$32,000 behind in child  
13 support. There are also installment debts that are  
14 outstanding.

15 His work history is very spotty and inconsistent. He  
16 realizes that he has the ability to make an honest living,  
17 but his bent has been in the opposite way -- in making an  
18 easy living, but not a lawful living.

19 The second consideration is for the Court to select a  
20 sentence that would reflect seriousness for this offense and  
21 promote respect for the law.

22 As I've mentioned, this is a serious offense. This  
23 identity theft is more than just passing a bad check, which  
24 that's what he began with. But the kind of identity theft  
25 that he was involved in was much more sophisticated and

1 dangerous.

2 Selecting a sentence that will promote respect for the  
3 law is a challenge, in that it appears from his record that  
4 he does not and has not in the past respected the law. He  
5 has tried to evade the law and made his decisions basically  
6 about the risk and rewards rather than whether it's legal or  
7 illegal.

8 But he now says that he has changed, that he really does  
9 want to change. He's talked about learning a trade. He  
10 understands he has the ability to make a living lawfully.  
11 And that he wants to use his time in prison to pursue  
12 vocational pursuits, to try to learn a trade and maximize his  
13 talents.

14 And the question the Court has is he going to be able to  
15 back up his rhetoric with his actions and will he begin to  
16 respect the law and the rights of others.

17 And the Court also has to consider what is just  
18 punishment. One of the goals of sentencing is to punish for  
19 their bad acts. What is just punishment for this offense.  
20 And furthermore, the Court must consider adequate deterrence  
21 to criminal conduct in the past.

22 Mr. Howard posed a question in his ending remarks about  
23 but for this case, would the defendant still be out on the  
24 streets, so to speak, perpetrating crimes against the public.  
25 Well, he's spent a long time in jail. He's been in jail

1       since November of '06. Not all in federal custody, but he's  
2       been in jail since this crime arose. And the Court senses  
3       that he is tired of it. As I remarked, it is a good thing  
4       that he is tired of it.

5               What will protect, also, the public from crimes of this  
6       defendant. Mr. Howard has also pointed out some of his  
7       criminal history, which indicates that he's been flimflamming  
8       people out of money for quite some while through criminal  
9       activity.

10              He's in the highest criminal history category. He has  
11       six convictions for which he received criminal history  
12       points, but many of those convictions had multiple counts.  
13       And they involve bad checks, theft of property, fraud, theft  
14       of ID, forgery, evading arrest, reckless endangerment, and  
15       domestic assault.

16              And then there's a number of arrests or pending charges  
17       for which he received none. They don't count in his  
18       calculations of criminal conduct, but they do indicate how  
19       he's been operating on the fringe. More bad checks. 13  
20       counts of forgery. 14 counts of theft. More forged checks.  
21       Conspiracy to pass forged instruments. Conspiracy to pass  
22       forged checks. Criminal simulation. And being a fugitive  
23       from justice.

24              So what we need to consider is what will protect the  
25       public from further crimes. Additionally, the Court should

1 consider how can he be improved by prison programs such as  
2 education, vocational, medical, and so forth. And he, to his  
3 credit, has mentioned his interest in pursuing some of those,  
4 including drug treatment.

5 The defendant has asked for a variance from the advisory  
6 guideline range, primarily because of his cooperation in this  
7 state prosecution. The defendant has asked for a variance of  
8 50% of what would be the low end of the guideline range.

9 The Government contests that; doesn't dispute the facts  
10 in the letter from the district attorney in Davidson County,  
11 but questions how that assistance helped his office in this  
12 case, how it would impact this case; and, in fact, how it  
13 would reflect on the sentencing factors in 3553(a).

14 First, I will say that the Court does not believe that  
15 Mr. McWhorter, being in the highest criminal history category  
16 and with his record of prior criminal activity and his  
17 failure to learn from past mistakes, should be on the low end  
18 under the sentencing range. A good argument could be made  
19 that he should be at the high end of the sentencing range.

20 But he's not the worst of the worst that this Court  
21 sees, by any means. So the Court has selected a mid range  
22 category for Mr. McWhorter. And based on his substantial  
23 assistance to the state, the Court will reduce that mid range  
24 for 35 months.

25 That does not represent, as I say, the 50% reduction.

1 And I didn't transpose the 35 months to a percentage, but it  
2 represents almost three years of imprisonment.

3 With that variance, which the Court grants because the  
4 Court finds he did render substantial assistance in that  
5 murder trial in the Metropolitan Davidson County courts --  
6 and according to the D.A., the defendant apparently was  
7 timely in terms of his notification that he had knowledge,  
8 important knowledge, relevant to the prosecution of that  
9 case. They found it to be timely. They also found that his  
10 testimony was reliable and it was truthful. And it was  
11 issued with knowledge beforehand that there was some risk  
12 involved in his revealing that information.

13 Mr. McWhorter has also referred to another inmate that  
14 was punished severely because of his cooperation with the  
15 authorities while he was in jail. So there was risk, serious  
16 risk, of bodily harm from fellow gang members in prison. And  
17 a certain amount of risk will continue as he serves out his  
18 sentence.

19 Further, the Court considered the fact that he did  
20 testify not only before the trial to give evidence, but also  
21 at the trial. And according to the assistant D.A., his  
22 testimony was material in bringing about the conviction of  
23 the accused in that case, a Mr. Cody.

24 So the Court grants him credit for that state  
25 cooperation, even though he did not cooperate in this case

1 and put the Government to the burden at every turn. But the  
2 Court gives the defendant credit.

3 And perhaps he has matured. He's now 31. Still a very  
4 young man. But he's spent a lot of the last few years in  
5 prison. And the Court credits his heartfelt statement that  
6 he not only wants out, he wants to turn his life around.

7 He wants to get off of drugs, learn a trade, earn a  
8 living -- a lawful living for him, and reestablish a  
9 relationship with his daughters.

10 This will allow him to do this with a sufficient  
11 sentence, but one which the Court believes is not greater  
12 than necessary to meet all the sentencing factors that I have  
13 mentioned.

14 The Court was aware of the sentencing options available  
15 to it. The Court also considered, as mentioned by  
16 Mr. Frensley, sentence disparities. Some of the other  
17 defendants were granted a larger percentage. But the  
18 guidelines are set up so that if you are in the highest  
19 criminal history category, then each level represents a much  
20 larger reduction than if you're in a smaller or a lower  
21 criminal category.

22 The Court also considered in that connection the  
23 importance of that cooperation that he gave and the  
24 cooperation they gave in their assistance to the Government  
25 in this case. Some were there from the very beginning. Some

1 entered later and knew less about the case. Some of their  
2 testimony was important, especially as it related to his  
3 conviction on Count 5; which I now mention is simply a  
4 guideline sentence.

5 The advisory guideline sentence is the statutory  
6 sentence for Count 5. It requires a 24 month sentence, which  
7 is to be served consecutive to the underlying sentence. So  
8 the 100 month sentence on Counts 1, 2, 3, and 4 will be  
9 followed by a 24 month sentence for Count 5, for a total of  
10 124 months.

11 With that analysis, the Court will now formally state  
12 the sentence, Mr. Frensley. So if you and Mr. McWhorter  
13 would stand, the Court will state the sentence.

14 It is the judgment of the Court that the defendant,  
15 James C. McWhorter, is hereby committed to the custody of the  
16 Bureau of Prisons to be imprisoned for a term of 124 months.

17 The 124 months shall be divided by terms of 100 months  
18 on Counts 1, 2, 3, and 4, each of which is to be served  
19 concurrent with each other. As to Count 5, the Court imposes  
20 a 24 month sentence which will be served consecutive to  
21 Counts 1, 2, 3, and 4.

22 Upon release from imprisonment, the defendant shall be  
23 placed on supervised release for a term of three years. The  
24 three-year term of supervised release shall apply to  
25 Counts 1, 2, 3, and 4, with each such term to run

1 concurrently with each other, each other count.

2 And as to Count 5, the Court imposes a period of  
3 supervised release of one year, which will run concurrently  
4 with the terms of supervised release on Counts 1, 2, 3, and  
5 4.

6 The Court has determined that the restitution in this  
7 case shall be \$114,536.26. That amount is arrived at by the  
8 prior sum that the parties and the Court have discussed of  
9 \$84,096.38. I've subtracted \$1,800.27 as a figure that has  
10 been shown by the defendant to be over-representative of some  
11 of the charges on the list. That would reduce that \$84,000  
12 figure to \$82,296.11.

13 The Government has reminded the Court that the minor  
14 businesses, that is all of those other than Wal-Mart, who  
15 sustained losses had not -- those figures were not included.  
16 The Court added those up and they are \$32,240.15. And when  
17 that is added to the \$82,296.11, it produces \$114,536.26.

18 There will also be a special assessment of \$100 for each  
19 count of conviction, for a total of \$500.

20 There will be no fine in the case. The Court finds that  
21 Mr. McWhorter is not in a financial position to pay any fine  
22 for the cost of the crime or the cost of his incarceration or  
23 the cost of his supervised release. That's especially true  
24 in view of the large restitution figure that will be imposed  
25 in this case.



1           Mr. McWhorter, as you know, after you are released from  
2 prison you'll be subject to certain conditions that will  
3 govern your conduct while you're on supervised release.  
4 They're the mandatory and standard conditions which apply to  
5 most all federal defendants. They'll be included in your  
6 *Judgment and Commitment* order.

7           However, there will be certain special conditions which  
8 will also apply in your case. Payment of restitution is one  
9 of those special conditions. The restitution shall be due  
10 and payable immediately.

11           Of course, Mr. McWhorter is now in jail and will be  
12 transferred to a federal prison facility. But while he's  
13 there, he will begin his payments under the Bureau of  
14 Prisons's Inmate Financial Responsibility Payment Program.

15           And those payments will be submitted to the Clerk of  
16 this Court, the United States District Court, here at 801  
17 Broadway, in Room 800.

18           The defendant shall be required to pay a minimum monthly  
19 rate of 10% of the defendant's gross monthly income. No  
20 interest shall accrue as long as the defendant remains in  
21 compliance with the payment schedule, as ordered.

22           And then they will continue after he is released from  
23 prison. He'll be required to pay at least 10%, not less than  
24 10%, of his total monthly income from all sources derived.

25           Payments will continue to be made to the Clerk of this

1 Court. No interest shall accrue as long as the defendant  
2 remains in compliance with this payment schedule.

3 The defendant, in that connection, is required to notify  
4 the court in writing if there's any material change in his  
5 economic circumstances that might affect his ability to pay.

6 The Court is going to recommend that Mr. McWhorter also  
7 receive benefit of the intensive drug program while he's  
8 incarcerated.

9 After he's released, he'll be subject to random drug  
10 testing, a program of drug testing and substance abuse  
11 treatment if recommended by the probation officer, which may  
12 include a 30 day inpatient treatment program.

13 But after he is released, he'll also have to undergo a  
14 program of nine months of outpatient treatment, drug  
15 treatment, by attending NA meetings or AA meetings here in  
16 the Davidson County area.

17 He'll have to attend those meetings twice a month for  
18 the first three months, and not less than one meeting per  
19 month for the first year.

20 As you probably know, Mr. McWhorter, those meetings are  
21 held multiple times a week, all over the city. If you're in  
22 Cookeville or that area, the requirements will be the same  
23 unless you find that there's no meeting place in the  
24 proximity and that that would, therefore, result in a  
25 hardship on you being able to attend those monthly meetings.

1 I mean those weekly meetings.

2 I say that just because my experience is that is the  
3 critical time for recovery. And nobody knows an addict like  
4 an addict. And my experience also tells me that people that  
5 go through the 30 day wonder treatment and don't follow up  
6 are likely to relapse.

7 So you can get a lot of support from these people that  
8 are going through the same thing as you, but you're still an  
9 addict subject to temptation and subject to relapse. Just  
10 like we had one last week that had completed their recovery  
11 and was tempted and ended up robbing a bank to get money for  
12 some drugs. So he's starting over.

13 But it's very tough to throw that habit. The good news  
14 is you can beat it, but you've got to be smart and diligent  
15 and consistent.

16 That's why I'm putting that as a part of your supervised  
17 release. Not to punish you, but to put a requirement on you  
18 that will inure to your benefit.

19 You're smart enough to do a lot of things. You've got  
20 more ability than lots of people that I see. But the  
21 drugs -- it doesn't matter about your brain power. If they  
22 get ahold of you, it doesn't matter whether you are a judge  
23 or work as a mechanic or you're a school teacher. It affects  
24 them all.

25 So work hard at that. And while you're in prison, take

1 advantage of every program you have for mental health  
2 treatment or drug treatment, so you can build up that  
3 resistance. And it will also broaden your ability to obtain  
4 employment after you're out.

5 If you have money or have insurance to pay all or part  
6 of the cost of this drug treatment, then you'll be -- or  
7 mental health treatment, if directed by your probation  
8 officer, you may be required to contribute all or part of the  
9 cost of that.

10 I just remind you of things you probably already know.  
11 But drug treatment outside, in the public, is usually very  
12 expensive. So take advantage of the opportunities while  
13 you're there. These weekly meetings are generally free, but  
14 the inpatient part is not.

15 You also may be required to furnish financial  
16 information to your probation officer, including where you  
17 work, when you work, your rates of pay, when you're paid,  
18 your monthly expenditures, assets, liabilities, and any other  
19 relevant information that may be requested of you.

20 Also, you're not to incur any new debt while these  
21 obligations are outstanding without the approval of your  
22 probation officer.

23 You'll have to cooperate with the probation officer in  
24 the collection of a DNA sample. That is required.

25 And, of course, as a convicted felon you are prohibited

1 from owning, carrying, or possessing any firearms, dangerous  
2 weapons, or destructive devices.

3 You, of course, have a right to appeal the --

4 First, let me say that all the conditions of supervised  
5 release, those that will be the mandatory and standard  
6 conditions in your *Judgment and Commitment* order and those  
7 special conditions I've just stated, are all important.

8 Should the Court find after a hearing that you've  
9 violated any of the conditions of supervised release, the  
10 Court may revoke your supervised release and require you to  
11 serve in prison up to the entire period of the supervised  
12 release.

13 Furthermore, revocation of supervised release is  
14 mandatory for certain violations, such as possession of a  
15 controlled substance.

16 The Court has stated the reasons for the sentence and  
17 will not repeat any of those. The Court will summarize by  
18 saying that the Court believes that the sentence imposed is  
19 one sufficient but not greater than necessary to meet those  
20 sentencing factors in 3553(a).

21 You do have a right to appeal the sentence that I've  
22 imposed, Mr. McWhorter. Mr. Frensley is very familiar with  
23 the appeal statute. I do remind you, however, that the time  
24 for appeal is a short window. It's 14 days.

25 If you wish to appeal, you must appeal within that 14

1 day period or you will be deemed to have waived your right to  
2 appeal.

3 You can appeal as an indigent person, without funds. If  
4 you so request, the Clerk will file a *Notice of Appeal* on  
5 your behalf.

6 Are there any other questions by the Government or you,  
7 Mr. Frensley, before we adjourn?

8 MR. HOWARD: None from the Government.

9 MR. FRENSLEY: I have just a few matters, Your  
10 Honor.

11 First, you'll recall Mr. McWhorter asked that Your Honor  
12 make a recommendation that the Bureau of Prisons place him at  
13 FCI Tucson.

14 Again, the rationale behind that was related to the  
15 cooperation in the Cody matter. The Vice Lords is primarily  
16 a gang originating out of Chicago, with not a great deal of  
17 influence west.

18 Mr. McWhorter, as Your Honor will recall from the  
19 presentence report, also has some background, having lived in  
20 Nevada for a period of time, but would ultimately like to  
21 relocate to that part of the world.

22 So we would ask that Your Honor make the recommendation,  
23 subject to the Bureau of Prisons' space and security  
24 requirements, that Mr. McWhorter be housed at FCI Tucson.

25 And likewise, Your Honor, that should he ultimately,

1       upon release, stay on the west coast or in that area, that  
2       the conditions that Your Honor has imposed could easily be  
3       met there with respect to the follow-up treatment and the  
4       like.

5               And then the only other matter, Your Honor, was the one  
6       that I brought to your attention regarding the jail credit.  
7       As the report reflects, and the evidence in the case --

8               THE COURT: I've got that you're requesting that he  
9       receive federal credit for all time spent in jail since  
10      transferred to federal custody on 10/12 --

11              MR. FRENSLEY: '07.

12              THE COURT: '07. Yes.

13              MR. HOWARD: Judge, just I failed to mention it  
14      myself. Our position on that is that's a BOP matter.

15              My understanding was that Mr. McWhorter was getting  
16      credit on a state sentence until he came to federal custody  
17      in January of 2009. If that's the case, his federal sentence  
18      should run from that point. If, of course, that's not the  
19      case, then it should be calculated earlier than that. But in  
20      any event, it's a Bureau of Prisons' calculation.

21              THE COURT: Okay.

22              Anything further, Mr. Frensley?

23              MR. FRENSLEY: I believe those were the only  
24      matters I had.

25              THE COURT: Pardon me?

1           MR. FRENSLEY: Those are the only matters, Your  
2 Honor. I believe Your Honor already addressed the intensive  
3 drug treatment.

4           THE COURT: I have the jail credit, intensive drug  
5 treatment, be housed as close to Tucson. You said there is a  
6 Tucson federal prison facility there. That he be housed  
7 there, if possible.

8           Is that it?

9           MR. FRENSLEY: Yes, Your Honor.

10          THE COURT: Okay. We'll stand adjourned.

11          MR. FRENSLEY: Your Honor, I apologize.

12          Just that you allow him to transfer to that -- that the  
13 supervised release be served after his release out there, if  
14 that's where he ends up.

15          THE COURT: He has a chance to pick his residence.

16          MR. FRENSLEY: Right.

17          THE COURT: It's a matter of procedure.

18          Generally, the probation officer where he's residing  
19 will supervise him.

20          MR. FRENSLEY: Yes, Your Honor.

21          THE COURT: So wherever he reports. He'll have to  
22 report to the federal probation office where he resides  
23 within that time period that I mentioned.

24          MR. FRENSLEY: Thank you.

25          THE COURT: If he says I'm living here, they'll



1 assign him somebody to supervise him.

2 MR. FRENSLEY: Thank you, Your Honor.

3 THE COURT: If he moves, they'll probably transfer  
4 that to somebody else.

5 MR. FRENSLEY: Yes, sir.

6 (Recess was taken at 4:00 p.m.)  
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REPORTER'S CERTIFICATE

I, Dorothy Stiles, Official Court Reporter  
for the United States District Court for the Middle District  
of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine  
the proceedings held in open court on June 28, 2010, in the  
matter of UNITED STATES OF AMERICA vs. JAMES C. McWHORTER,  
Case No. 3:07-CR-00159-1; that said proceedings in connection  
with the hearing were reduced to typewritten form by me; and  
that the foregoing transcript (Volume 8, Pages 537 through  
697) is a true and accurate record of said proceedings.

This the 23rd day of September 2010.

/s/ Dorothy Stiles, RMR, CRR  
Official Court Reporter